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Supreme Court, U.S.
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No. 04- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PAN AMERICAN ENERGY, LLC,

Petitioner,

v.

CANDLEWOOD TIMBER GROUP, LLC, AND FORESTAL SANTA BARBARA SRL,

Respondents.

On Petition for a Writ of Certiorari To The Supreme Court of Delaware

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a state court may wholly disregard foreign sovereign interests in deciding whether to exercise jurisdiction over a foreign dispute.

PARTIES TO THE PROCEEDINGS

There are no other parties to this dispute.

RULE 29.6 STATEMENT

Petitioner Pan American Energy LLC is 60% indirectly owned by BP p.l.c. No other publicly held corporation owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pan American Energy LLC ("Pan American") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Delaware.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is the decision of the Supreme Court of Delaware in *Candlewood Timber Group LLC* v. *Pan American Energy, LLC*, No. 543,2003. The opinion of the Supreme Court of Delaware is unpublished and is reproduced in the Petition Appendix ("App.") at 1a-32a. The opinion of the Court of Chancery of Delaware is unpublished and is reproduced at App. 33a-47a.

JURISDICTION

The Supreme Court of Delaware entered judgment on October 4, 2004. This Court has jurisdiction under 28 U.S.C. § 1257 and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

PROVISIONS OF FEDERAL LAW INVOLVED

This case involves principles of the federal common law of foreign relations.

STATEMENT OF THE CASE

This case raises important questions regarding the intervention of American state courts in foreign commercial disputes that threaten a foreign country's sovereign interests. In this action filed in Delaware state court, respondents have asserted claims that implicate Argentina's internal regulation of real property, forest use, and hydrocarbons exploration and development, all of which are extensively regulated by

Argentine law and over which Argentine courts have exclusive jurisdiction. Moreover, the Nation of Argentina has formally notified the United States that this case threatens its overriding sovereign interests in the regulation and development of its hydrocarbon fields, which are regarded as federal utilities under Argentine law and from which the Argentine government receives substantial royalties through government concessions to oil and natural gas producers. Both the Nation of Argentina and the Province of Salta (where the property in dispute is located) have affirmatively joined litigation pending in the Argentine Supreme Court that would ultimately resolve the dispute between the litigants in this case while protecting the important sovereign interests of the Nation of Argentina and of the Province of Salta. In its answer filed with the Argentine Supreme Court, the Nation of Argentina objected to the Delaware Court's jurisdiction. Argentina declared that its "sovereignty and provision of public services is at stake" in this dispute, noting that "one or more rulings by a foreign court might jeopardize the exercise of the Executive's powers, the authority of laws enacted by the Federal Congress and the jurisdiction of the Federal Supreme Court." App. 70a, 71a (Argentine Answer, dated Sept. 16, 2003).

Remarkably, the Delaware Supreme Court held below that foreign sovereign interests must be excluded from any decision of a state court to exercise jurisdiction because they are "legally irrelevant." App. 15a. Even in cases posing grave threats to foreign sovereign interests, the only standard the state court applies is the general principle governing a *forum non conveniens* determination under state law in any garden-variety case: namely, whether "[the defendant] will be subjected to overwhelming hardship and inconvenience if required to litigate in [state court]," a standard which the Delaware Supreme Court acknowledges is met "only in a rare case." *Id.* (internal quotation marks omitted). According to the state court, Argentina's "far greater interest in the

controversy" cannot be considered because it has "no logical relevance" to the hardship to the parties of litigating in Delaware. *Id.* at 16a. Indeed, the "governmental interests of Argentina would be a relevant factor" only if the "Argentine governmental entities are indispensable parties, such that Pan American would be prejudiced if this case proceeded in Delaware without the presence of those Argentine governmental entities." *Id.* at 18a.

The assertion of state court jurisdiction in wholesale disregard of foreign sovereign interests in a foreign dispute is destructive of the foreign relations of this country. The logic of the Delaware Supreme Court is contrary to basic principles of federal law and international comity. Federal common law governs "international disputes implicating the conflicting rights of States or our relations with foreign nations," for "our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The decision below is in conflict with the decisions of the United States Courts of Appeals for the Fifth and Eleventh Circuits and of the Illinois Supreme Court, which recognize the rule that American courts should abstain from exercising jurisdiction over foreign disputes that trench upon foreign sovereign interests. This Court's intervention is imperative to vindicate this settled rule of federal common law and to protect Argentina's fundamental interests.

A. Argentina's Comprehensive System For The Development And Regulation Of Hydrocarbons.

To ensure the uniform, orderly development of its oil and natural gas reserves, the Nation of Argentina created a comprehensive legal regime that governs virtually every aspect of those resources' production. This regulatory framework aims to satisfy Argentina's energy needs through

the development of its domestic hydrocarbon fields. App. 58a. The Argentine government's strong interest in developing its oil and gas resources is reflected in the National Constitution, which established that Nation's hydrocarbon fields as federal public utilities. *Id.* at 59a.

As Professor Edmundo F. Catalano, petitioner's expert on Argentine law, explained, all of Argentina's hydrocarbon fields are publicly owned, and the federal and provincial governments guide the exploration, development, and transportation of these resources by granting permits and concessions to private parties. Professor Catalano's affidavit is reproduced at App. 117a-138a. These concessions confer an exclusive right to extract the hydrocarbons within a given area and authorize any construction or other activities necessary for that purpose. App. 60a. In return for these rights, the Hydrocarbon Law requires concessionaires "to make such investments as are necessary for the development of the entire concession area, *ensuring the largest hydrocarbon production* that is consistent with appropriate and economic field management." *Id.* at 61a, 53a n.1. In other words, Argentine law affirmatively mandates the aggressive development of Argentina's oil and gas resources. Concessionaires must also pay substantial concession fees and royalties to both the federal and/or provincial governments. *Id.* at 61a.

To minimize conflicts between the rights of surface owners and the government's hydrocarbon program, Argentina's statutes and regulations carefully delineate the legal relationship between concessionaires and surface owners, spelling out the rights and duties of each. The concession holders – like petitioner in this case – enjoy a "public use" privilege, by which the rights of surface owners are subordinated to the needs of the hydrocarbon industry. App. 121a; see also App. 60a-61a. This broad privilege guarantees access to the subsurface estate through government-authorized easements over surface lands, for which the

surface owner's consent is not needed, and even permitting surface lands to be taken by eminent domain. App. 60a-61a; App. 121a-122a. The procedures for creating easements or taking land are both detailed in the Hydrocarbon Law.

Argentine law also defines the nature and scope of a concessionaire's obligations to surface owners. The law contains standards that regulate the concessionaires' mining operations so as to minimize their effect on surface activities. App. 62a-63a. In addition, the Hydrocarbon Law defines the concessionaires' duties to compensate surface owners for damage to their property. *Id.* at 62a. Under the Law, the amount of compensation may be determined either judicially or administratively, and the national government has even established standard levels of compensation for property within certain regions of the country. *Id.* at 62a-63a. As the Argentine National Government has stated in regard to this dispute,

> unless a valid private agreement shall have been reached between the concession holder and the surface owner regarding the compensation amounts payable, these amounts shall exclusively derive from the amounts determined by: i) the Federal Executive, by zone, by virtue of the powers vested in it by Section 98, subsection h) and Section 100 of Act 17,319 [the Hydrocarbon Law]; ii) the Federal Secretariat of Energy, in accordance with the procedure set forth in Section 3 of Decree No. 6,803/68 and iii) the appropriate Argentine courts, at the request of either party.

Id. at 63a.

B. Factual Background.

Petitioner Pan American Energy LLC ("Pan American"), a Delaware limited liability company, is engaged through its Argentine branch in the business of oil and gas exploration and production. Pan American's principal place of business is Argentina, where it is the second largest producer of oil and

gas. See App. 140a (Second Amended Complaint ¶ 2). Pan American is the majority owner in an Argentine joint venture that holds long-term concessionary rights to extract oil and gas from land within the Argentine Province of Salta, including the property in dispute here.

Respondent Forestal Santa Barbara, SRL ("FSB") is an Argentine company with its principal place of business in Argentina. FSB is a wholly-owned subsidiary of respondent Candlewood Timber Group, LLC, a Delaware limited liability company that sells wood products from sustainably managed forests. FSB owns and operates a forestry business on 70,000 acres of the San Pedrito forest in the Province of Salta (the "Acambuco Property"). App. 141a-142a (Second Amended Complaint ¶ 8). When FSB purchased the Acambuco Property in 1998, the property had been for many years, and continued to be, subject to the mining easements established by Argentine law. App. 51a.

As the holder of a government-authorized concession granted years before FSB stepped foot in the area, Pan American contacted FSB in 1999 regarding Pan American's need to access the Acambuco Property in order to develop the hydrocarbon resources on that property. If FSB had refused access, Argentine law would have permitted Pan American to enter the property as a matter of right. Though FSB's consent was unnecessary for the development of those hydrocarbon resources, respondents allege that Pan American and FSB ultimately reached an agreement permitting Pan American to enter the Acambuco Property. App. 146a-147a (Second Amended Complaint ¶ 24). The agreements attached to the complaint required Pan American to purchase comprehensive liability insurance for damage to FSB's property and to indemnify FSB for any damage that resulted. By protecting FSB's right to compensation while ensuring Pan American's right of access, these alleged agreements essentially memorialized the preexisting rights and obligations of concessionaires under Argentine law. The agreements could

hardly do otherwise, because these Argentine "public policy rules cannot be ignored or set aside by agreements between private entities." App. 137a. Significantly, these putative "contracts" are "Temporary Entry, Traffic and Stay Permit[s]," of only a page in length each, and they contain no definition of the substantive duties of Pan American in building and operating pipelines on respondents' lands. App. 158a-160a (Second Amended Complaint, Exs. A & B).

C. Proceedings Below.

On January 28, 2003, respondents filed this action against Pan American in the Delaware Court of Chancery. In their initial complaint, respondents sought damages and far-reaching equitable relief for damage to their property that was allegedly caused by Pan American's road construction and oil and gas operations. In addition, respondents sought the disgorgement of profits and cost savings from Pan American's operations, and permanent injunctions dictating remediation of the lands, reporting and consent requirements, and pipeline construction practices.

On March 5, 2003, Pan American filed a petition in the Supreme Court of Argentina, seeking a declaration that FSB's action is subject to the exclusive jurisdiction of the Argentine federal courts. Due to the country's significant economic and regulatory interest in the parties' dispute, Pan American's declaratory action named the national and provincial governments as parties, in addition to FSB and Candlewood. The Attorney General of Argentina issued an opinion supporting Pan American's petition, and the federal and provincial governments both entered appearances shortly thereafter. Those governments agreed that this dispute is governed by Argentine law and that the Argentine courts have exclusive jurisdiction over the case. On March 14, 2003, Pan American filed a motion in Delaware Chancery Court seeking to dismiss or stay the Delaware action pending final judgment in the Argentine case.

On May 21, 2003, in an attempt to salvage state court jurisdiction, FSB filed a second amended complaint that dropped certain far-reaching claims for injunctive relief, but still sought an injunction to obtain comprehensive insurance policies and disgorgement of "all savings and avoided costs retained by Pan American by virtue of its unlawful and improper actions on Candlewood Forest Property." App. 156a (Second Amended Complaint at 18). More critically, in asserting various common law tort and contract claims, FSB has asked the Delaware state courts to determine the lawfulness of Pan American's conduct in constructing pipelines by applying "international standards for forest engineering." *Id.* at 153a (Second Amended Complaint ¶ 48). FSB requested the Delaware state courts to determine that Pan American's Argentine operations were "negligent and reckless" because of,

> (i) the massive, uncontrolled excavation and clearing of forest and vegetation; (ii) the sidecasting of more than one million cubic yards of soil, rock, earth and vegetation; (iii) the constructing of roadways, spur roads and pipeline that are overly invasive and that cause a significant risk of fire, erosion, landslides and runoff, as well as damage to wildlife; and (iv) the storing and disposal of toxic and/or flammable materials on the Candlewood Forest property.

Id. Respondents also charged petitioner, among other things, with misappropriation of earth, timber, and water, and with precluding forest productivity. *Id.* at 155a (¶ 56).

While Pan American's motion to dismiss or stay was pending, the Nation of Argentina formally notified the Department of State about its profound concerns with the pendency of the Delaware state court action. Argentina asserted "its utmost interest that legal questions arising within the framework of the Ley de Hidrocaburos (Hydrocarbon Law) . . . between the licensee of hydrocarbon and the owners of the surface realty be dealt with in conformity with

Argentine law and before the Courts of the Argentine Republic." App. 115a (Letter from Embassy of Argentina to the Department of State, Office of Legal Advisor, dated June 19, 2003.) In an answer filed with the Argentine Supreme Court on September 16, 2003, the Argentine government reiterated that its sovereign interests were impaired by the Delaware litigation and that Argentine courts have exclusive jurisdiction over this dispute. App. 57a-71a. These concerns were echoed by the Ministry of Federal Planning, Public Investment and Services, which concluded that "the sovereignty of the Argentine Government . . . [and the] . . . possible effects on the continuity and regularity of hydrocarbon exploration, exploitation and transportation activities carried out in Argentina are at stake." App. 107a (Letter from the Undersecretary of Fuels to Pan American, dated June 24, 2003).

On October 22, 2003, the Delaware Court of Chancery dismissed respondents' action. In addition to finding that respondents had failed to establish equity jurisdiction, the court dismissed these claims based on the doctrine of *forum non conveniens*. App. 47a. The Chancery Court recognized not only the enormous practical difficulties of litigating this case in the United States, but also that Argentine law would "almost certainly govern" because "[t]he heart of this case involves a land use dispute arising under the laws of Argentina." *Id.* at 42a, 43a. The court further noted that "[a] decision in this action will likely implicate Argentina's right to regulate access to surface property that lies above government owned oil and gas fields" and would "implicate Argentina's economic interests because a decision adverse to Pan American may reduce the revenues Argentina derives from Pan American's extraction activities." *Id.* at 44a. The court cautioned that "although the complaint sounds in simple breach of contract and negligence language, it is clear that resolution of this dispute will require thorough consideration of Argentine hydrocarbon law and policy, as well as a careful

policing of the boundaries between Argentine tort, contract, and real property law." *Id.* at 45a n.36. Although respondents sought to bolster their complaint by including the report of a forestry expert, their own expert noted that there was disagreement over whether FSB even owned the land that had allegedly been damaged. App. 162a-163a (Second Amended Complaint, Ex. C).

Eschewing the foreign relations concerns highlighted by the Court of Chancery, the Supreme Court of Delaware reversed. It held that the Chancery Court had "imported into its analysis a consideration that is legally irrelevant" when it gave "predominate weight" to Argentina's "far greater interest in the controversy." App. 15a, 16a. Rather, the state court must determine whether "[the defendant] will be subjected to overwhelming hardship and inconvenience if required to litigate in [state court]," a standard which the Delaware Supreme Court acknowledged is met "only in a rare case." *Id.* at 15a (internal quotation marks omitted). The Delaware Court concluded that foreign sovereign interests in a controversy are legally irrelevant because they have "no logical relevance" to the hardship to the parties of litigating in Delaware. *Id.* at 16a. Indeed, the "governmental interests of Argentina would be a relevant factor" only if the "Argentine governmental entities are indispensable parties, such that Pan American would be prejudiced if this case proceeded in Delaware without the presence of those Argentine governmental entities." *Id.* at 18a. The court further ruled that Argentina's courts did *not* have exclusive jurisdiction over respondents' claims and those claims against Pan American were transitory. *Id.* at 27a-29a. Finding Delaware to be an adequate forum for the resolution of FSB's claims, but that those claims are primarily legal in nature, the court transferred jurisdiction to the Superior Court of Delaware. *Id.* at 32a.

D. Finality of the Judgment.

The judgment below is a final judgment under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). The state court's exclusion of foreign sovereign interests from the calculus of deciding whether to accept jurisdiction is contrary to the federal common law of foreign relations. See *infra* 12-25. The decision below is immediately reviewable by this Court even though the case is on remand to the Superior Court. This Court has jurisdiction,

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-83. The state court's assertion of jurisdiction over this dispute, which would entangle the Delaware courts in a foreign nation's regulatory system and deeply implicate that country's sovereign interests, seriously erodes federal policy. "'It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice.'" *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1122 (5th Cir. 1985) (quoting *Republic of Iraq* v. *First Nat'l City Bank*, 353 F.2d 47, 50 (2d Cir. 1965)). And, because this Court's "reversal of the state court on the federal issue would be preclusive of any further litigation," 420 U.S. at 482-83,

this case falls squarely within *Cox Broadcasting*'s fourth category of exceptions to the finality requirement.[1]

REASONS FOR GRANTING THE PETITION

Although respondents have framed their counts as simple common law claims, "an examination [of their complaint] shows that the[ir] . . . claims necessarily require determinations that will directly and significantly affect American foreign relations." *Republic of Philippines* v. *Marcos*, 806 F.2d 344, 352 (2d Cir. 1986). As the Court of Chancery noted, deciding this case would force the Delaware courts to decide issues of the duties of hydrocarbon producers to surface land owners that are of fundamental sovereign importance to Argentina and exclusively governed by its statutes and regulations. Because this case presents the issue of whether courts may exercise jurisdiction in disregard of foreign sovereign interests, the "basic choice regarding the competence and function of the Judiciary and National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964). Accordingly, "matters

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[1] Reviewability is not affected by *Van Cauwenberghe* v. *Biard*, in which this Court held that a federal court of appeals lacked jurisdiction under the collateral order doctrine of 28 U.S.C. § 1291 to review a district court's order denying a *forum non conveniens* motion. 486 U.S. 517 (1988). The principal reason is that petitioner does not seek review of the overall balancing of private and public interest factors, which was the issue in *Biard*, and which this Court held would unduly enmesh the reviewing court in the merits of the case. *Id.* at 527-29. Here, petitioner asks this Court to review the federal issue of whether a state court may wholly disregard foreign sovereign interests in deciding to exercise jurisdiction over foreign disputes. Moreover, the *Cox Broadcasting* finality factors under 28 U.S.C. § 1257 are not limited to the collateral order doctrine of § 1291. *See Flanagan* v. *United States*, 465 U.S. 259, 265 n.3 (1984) (distinguishing the finality requirements of § 1257 from those of § 1291).

bearing on the Nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'" *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting *Sabbatino*, 376 U.S. at 425).

The need for a federal rule requiring that state courts give proper deference to foreign sovereign interests in deciding to exercise jurisdiction is starkly apparent in this case. The exercise of jurisdiction by the Delaware courts threatens to interfere with Argentina's legal framework regulating the government-owned hydrocarbon reserves. Whether or not a plaintiff brings only state-law claims against another private party, that action invokes the federal common law of foreign relations if the complaint substantially affects a foreign country's sovereign interests. See *Torres* v. *S. Peru Copper Corp.*, 113 F.3d 540, 542-43 (5th Cir. 1997). Deciding this case would "require thorough consideration of Argentine hydrocarbon law and policy, as well as a careful policing of the boundaries between Argentine tort, contract, and real property law." App. 45a n.36. These are not matters of purely private concern in Argentina, as they might be in this country. Instead, they are of fundamental concern to Argentina's sovereign interests as both an owner and regulator of its natural resources. Accordingly, this critical issue of federal law must be decided "to protect uniquely federal interests." *Sabbatino*, 376 U.S. at 426.

Review is especially warranted in this case because the decision below, which transferred jurisdiction to the Delaware common law court instead of dismissing or staying the action, conflicts with the decisions of other jurisdictions. Specifically, the Delaware Supreme Court and the Ninth Circuit's refusal to consider the significance of foreign sovereign interests, especially when the foreign nation itself protests the exercise of jurisdiction, conflicts with the analysis employed by the Fifth and the Eleventh Circuits and the Illinois Supreme Court. It is intolerable for Argentina's

sovereign interests to be fully protected in litigation in Illinois, Georgia, or Texas, but for those same interests to be "legally irrelevant" in Delaware or California. Review by this Court is thus warranted to resolve this split of authority and to ensure "uniformity in this country's dealings with foreign nations." *Id.* at 427 n.25.

THERE IS A CONFLICT AMONG THE LOWER COURTS OVER WHETHER TO DECLINE JURISDICTION IN CASES THAT THREATEN A FOREIGN STATE'S SOVEREIGN INTERESTS.

The rule announced below is breathtaking in its implications for the foreign relations of this Nation. The Delaware Supreme Court held that whenever a plaintiff invokes state court jurisdiction to determine a foreign dispute, even one unquestionably governed by foreign law, the state court will exercise jurisdiction unless the defendant meets "'the heavy burden'" of "'establish[ing] with particularity that [the defendant] will be subjected to overwhelming hardship and inconvenience if required to litigate in [state court].'" App. 15a. Critically, the Delaware Supreme Court has declared that foreign sovereign interests are "legally irrelevant" to a state court's assertion of jurisdiction over foreign disputes. *Id.* Abstention from jurisdiction is strictly a matter of hardship to the parties litigating in Delaware under ordinary *forum non conveniens* principles, and "only in a rare case" of overwhelming hardship to defendants will a plaintiff's choice of the American state forum be disturbed. Federal law forbids the assertion of state law powers that does serious violence to the foreign relations of this country.

Furthermore, in vesting jurisdiction in the Delaware Superior Court, the decision below conflicts with precedents from other jurisdictions that decline jurisdiction if a case implicates a foreign country's sovereign interests. Specifically, other courts have abstained (i) when a foreign government has given formal notice that the pending action

threatens its sovereign interests, and/or (ii) if asserting jurisdiction would enmesh the court in a foreign country's internal regulations and policies.

1. The decision below conflicts with precedents from the United States Courts of Appeals for the Fifth and Eleventh Circuits and from the Illinois Supreme Court. The Fifth Circuit's decision in *Torres*, is squarely on point. There, as here, private plaintiffs brought tort claims against a Latin American natural resources producer (a Peruvian copper mining corporation). As the Argentine national government has done here, in *Torres* the State of Peru notified the Department of State that "the litigation implicates some of its most vital interests and, hence, will affect its relations with the United States." 113 F.3d at 542. Although Peru was not a party to the case, the Peruvian government's notice alerted the Fifth Circuit "to the foreign policy issues implicated by this case." *Id.* at 542-43.

Unlike the Delaware Supreme Court, the Fifth Circuit did not exclude foreign sovereign interests from its review of a *forum non conveniens* order. To the contrary, the *Torres* court upheld the dismissal of the tort action precisely out of deference to those sovereign interests. The Fifth Circuit first established that, even though the complaint raised only state law claims, the district court had federal question jurisdiction under the federal common law of foreign relations, which was a necessary predicate to a *forum non conveniens* order. *Id.* The Court noted that the Peruvian government owned mining and land interests, and "grant[ed] concessions that allow [the defendant] to operate in return for an annual fee. Moreover, the government extensively regulates the mining industry." *Id.* at 543. The Fifth Circuit concluded that

> [t]his action therefore strikes not only at vital economic interests but also at Peru's sovereign interests by seeking damages for activities and policies in which the government actively has been engaged. On the record before us we must conclude that plaintiffs' complaint

> raises substantial questions of federal common law by implicating important foreign policy concerns.

Id. Accordingly, the Fifth Circuit upheld the district court's dismissal of the actions "on the basis of *forum non conveniens* and comity among nations." *Id.* at 542, 544. The Fifth Circuit's analysis is diametrically opposed to the Delaware Supreme Court's. See also *Marathon Oil Co.* v. *Ruhrgas, A.G.*, 115 F.3d 315, 320 (5th Cir. 1997) (characterizing *Torres* as a case in which "the suit itself struck directly at vital economic interests of the nation, and, indeed, at the very sovereignty of the Republic of Peru"), *vacated on other grounds*, 145 F.3d 211 (5th Cir. 1998) (en banc), *rev'd and remanded on other grounds*, 526 U.S. 574 (1999).

Consistent with its holding in *Torres*, and at odds with the decision below, the Fifth Circuit in *Callejo* v. *Bancomer, S.A.* affirmed the dismissal of a case due to the foreign relations implications of asserting jurisdiction. 764 F.2d 1101 (5th Cir. 1985). The plaintiffs in *Callejo* had brought an action for breach of contract whose adjudication "would necessarily call into question" Mexico's currency exchange control regulations. *Id.* at 1115-16. Because the defendant bank had discharged its obligations according to those regulations, the court could provide relief on the plaintiffs' claim "only by disregarding the regulations." *Id.* at 1116. Similarly, entertaining the respondents' claims in this case would effectively establish a *new* standard, one contrary to Argentina's hydrocarbon framework. Just as the Mexican government's "power to issue exchange control regulations is paradigmatically sovereign in nature," *id.*, so too is Argentina's power to establish rules governing the rights and obligations of hydrocarbon concessionaires.

The Eleventh Circuit follows a similar approach. In *Pacheco de Perez* v. *AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998), the court found "it significant, for purposes of this case, that the Venezuelan government has taken no position on whether this lawsuit proceeds in the United States or in

Venezuela." *Id.* at 1378. It concluded that "[w]ithout such an indication from the foreign nation, we are reluctant to find that the plaintiffs' private cause of action sounding in Georgia tort law implicates important foreign policy on the face of the plaintiffs' pleadings." *Id.* Likewise, in *Turner Entertainment Co.* v. *Degeto Film GmbH*, the Eleventh Circuit affirmed the dismissal of a case based on principles of international comity. 25 F.3d 1512 (11th Cir. 1994). The Eleventh Circuit noted that "[a]lthough Turner attempts to portray the case as a garden variety contract action, there are complicated issues surrounding the case that require extensive knowledge of the European television market." *Id.* at 1521. Thus, the Eleventh Circuit, like the Fifth Circuit, accords significant, if not dispositive, weight to foreign sovereign interests, at least when the foreign sovereign opposes the suit. The Eleventh Circuit does not ignore those interests in deciding whether to accept jurisdiction, as the Delaware Supreme Court does.[2]

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[2] The ruled adopted by the Fifth and Eleventh Circuits is consistent with other precedent. For example, in *Sequihua* v. *Texaco, Inc.*, the Southern District of Texas emphasized the foreign government's objections in its decision dismissing the case based on the doctrines of comity and *forum non conveniens*. 847 F. Supp. 61 (S.D. Tex. 1994). *Sequihua* involved a series of tort claims brought by Ecuadoran residents for the contamination of their community. In its order dismissing the case, the *Sequihua* court emphasized that the "Republic of Ecuador has officially protested this litigation, asserting that it will do 'violence' to the international legal system, and has asked that the case be dismissed." *Id.* at 62. The court dismissed the case under the doctrine of comity of nations because, *inter alia*, "the Republic of Ecuador has expressed its strenuous objection to the exercise of jurisdiction by this Court." *Id.* at 63. *See also Jota* v. *Texaco Inc.*, 157 F.3d 153, 160 (2d Cir. 1998) (recognizing the prior significance of *Sequihua* when the Ecuadoran government "had repeatedly written the District Court arguing that this case implicated Ecuador's sovereign interests and should not be decided in a United States court"); *cf. In re Tobacco/Govtl. Health Care Costs Litig.*, 100 F. Supp. 2d 31, 37 (D.D.C. 2000) (emphasizing, in its decision remanding the case to state court, the foreign sovereigns' resistance to federal court jurisdiction); *Harrison* v. *Wyeth Labs. Div.*, 510 F. Supp. 1, 4 (E.D. Pa. 1980) ("the courts of the United States are ill-equipped to set a

The Illinois Supreme Court is also aligned against the Delaware Supreme Court on this issue. In *Jones* v. *Searles Laboratories*, the Illinois Supreme Court affirmed the dismissal of a tort action based on *forum non conveniens*. 444 N.E.2d 157 (Ill. 1982). The plaintiffs in *Jones*, who were all citizens of the United Kingdom, sought damages from their use of the defendant company's pharmaceuticals. In its decision, the Illinois Supreme Court emphasized that the defendant's British subsidiary had controlled the issuance of drug warnings, allowing the subsidiary "to conform to the rules of local regulatory authorities." *Id.* at 161. The court raised the specter that "a court in Illinois could determine that defendant's warnings were inadequate although they conformed to the law of the country in which the drugs were marketed." *Id.* The Illinois Supreme Court considered it "'an inappropriate usurpation of a foreign court's proper authority to decide a matter of local interest, for a court in this country to set a higher standard of care than is required by the government of the country in which the product is sold and used.'" *Id.*

By contrast, the Ninth Circuit is aligned with the Delaware Supreme Court, and against the Fifth and Eleventh Circuits. In *Patrickson* v. *Dole Food Co.*, the Ninth Circuit considered whether to assert jurisdiction over a class action brought by Latin American workers against a group of multinational companies for exposure to a toxic pesticide. 251 F.3d 795 (9th Cir. 2001). Dismissing the foreign relations concerns highlighted by the Fifth and Eleventh Circuits, the Ninth Circuit expressly repudiated the notion that a foreign government's formal notice should affect the decision to

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standard of product safety for drugs sold in other countries"), *aff'd*, 676 F.2d 685 (3d Cir. 1982) (table); *Sequihua*, 847 F. Supp. at 63 (noting that the plaintiffs' request for a privately-financed trust fund "asks this Court to step into the shoes of the Ecuadoran Health Ministry and supervise a medical monitoring scheme of unknown costs, scope or duration for as many as 500,000 Ecuadoran citizens over the protest of the government of Ecuador").

abstain. Rather than promoting comity between nations, the Ninth Circuit feared that,

> [i]f courts were to take the interests of the foreign government into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation, dismiss it on some ground such as forum non conveniens, or deal with it in some other way.

Id. at 804. This mature division in the lower courts over the recurring question of what is the proper treatment of foreign sovereign interests is an important question of federal law that this Court should resolve.

2. Courts have long recognized that the "control over a nation's natural resources stems from the nature of sovereignty." *Int'l Ass'n of Machinists & Aerospace Workers* v. *OPEC*, 477 F. Supp. 553, 568 (C.D. Cal. 1979) ("*IAM I*"). Even the Ninth Circuit has acknowledged that both the "United States and other nations have supported the principle of supreme state sovereignty over natural resources." *Int'l Ass'n of Machinists & Aerospace Workers* v. *OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981), *disapproved of on other grounds*, *Siderman de Blake* v. *Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992); *IAM I*, 477 F. Supp. at 568 ("The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples."); see also *United States* v. *Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977) (noting "the control that a sovereign . . . has over the natural resources within its territory"). Courts acknowledge this sovereign interest regardless of whether the foreign government is a named party in the suit. See, *e.g.*, *Grynberg Prod. Corp.* v. *British Gas, P.L.C.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993) (concluding that "[a]lthough the Republic of Kazakhstan is not a party to this lawsuit, its interests in allocating its own mineral resources are vitally affected by the outcome").

Critical sovereign interests are present in this case. Not only do the Argentine federal and provincial governments own all the oil and gas fields in the country, but also they derive substantial royalties from the development of those resources. Moreover, though Peru and Argentina both granted concessions to private parties, a government's legal relationship with its natural resources "persists even after it conveys away any concession interest. This relationship exists by right of sovereignty." *Id.* at 1359. By contrast, the Delaware Supreme Court credited none of those considerations in its decision.

An action that interferes with a foreign government's internal regulations likewise "strike[s] at the sovereignty of a foreign nation." *Ruhrgas*, 115 F.3d at 315. There is "little question that establishing the terms and conditions for removal of natural resources from its territory, when done by a sovereign state, individually and separately, is a governmental activity." *IAM I*, 477 F. Supp. at 568. Interference with a foreign country's internal policies is especially likely in this case, where the decisions of the Delaware state courts would likely supplant the Argentine government's carefully prescribed rules for the development of oil and gas. On this issue, the Delaware Supreme Court stands virtually alone, its disposition of this case irreconcilable with a long line of consistent precedent.

Courts have recognized "the conflict of national interests that is created by the attempt of one state to regulate resource development in another state." *Mitchell*, 553 F.2d at 1003 n.13. Just as Congress "presumably recognizes the authority of other sovereigns to protect and exploit their own resources," *id.* at 1002, this Court must be vigilant to see that the federal and state judiciary does not interfere improperly with foreign sovereign interests and undermine American relations with those sovereigns.

The risk of interference with Argentina's internal regulations is particularly acute in this case. As noted, the

federal and provincial governments of Argentina have extensively regulated every facet of the Argentine oil and gas development process. From granting concessions to companies like Pan American, to ensuring access to hydrocarbon fields through the power of eminent domain, to defining the rights and obligations of concessionaires and surface owners, the Argentine government has supplied the governing rule. Not only does the Hydrocarbon Law establish certain rights, like the "public use" privilege by which concessionaires are empowered with the eminent domain authority, but also it sets forth the procedures that must be followed in order to exercise those rights. Most relevant for this case, Argentine law requires concessionaires both to compensate surface owners and to conduct their mining operations in a manner that minimizes the effect on surface activities. Through its statutes and regulations, Argentina carefully demarcated the boundary between a concessionaire's permissible and impermissible conduct, and the courts of Argentina clearly are available to protect the private and public rights implicated in a dispute such as the one involved in this case. In sum, Argentina protects the property rights of surface owners in a manner consistent with the concessionaire's obligation to "ensur[e] the largest hydrocarbon production" reasonably possible. App. 61a, 53a n.1.

The Delaware Supreme Court simply dismissed these sovereign interests, notwithstanding their formal assertion by the Argentine Government (both diplomatically and judicially). Remarkably, the court shunted aside the Argentine government's answer in the Argentine Supreme Court, which stated that "the 'basic institutions of the Nation [were] at risk' because of 'the possibility that gas production in the Acambuco area could be … affected' by 'one or more

rulings by a foreign court.'"[3] App. 5a (alteration and omission in original). The Delaware Supreme Court discounted that official statement of position because,

> [t]hat pleading did not disclose to the Argentine Court that Candlewood was seeking only damages based on common law claims arising out of private contracts with Pan American. Nor did that pleading disclose that Candlewood had previously informed the Court of Chancery (and Pan American) that they were "not seeking any injunctive relief requiring supervision of Pan American's conduct on the land in Argentina."

Id.

The Delaware Supreme Court misses the point. Whether respondents dropped the most brazen of their requests for permanent injunctive relief is unclear and is not the issue. If Pan American is subject to a claim for massive damages in Delaware courts, for Pan American's construction and engineering practices that allegedly violate claimed "international standards for forest engineering," App. 153a (Second Amended Complaint ¶ 48), the effect is no different than injunctive relief. If found liable, Pan American, in order

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[3] Not only did the Delaware Supreme Court announce a cavalier rule of unyielding state court jurisdiction, but it also insulted the Argentine National Government by implying that it simply bent to the "influence" of Pan American in its submissions to the Argentina Supreme Court. The Delaware Supreme Court stated that "Pan American appears to have used its access to the highest levels of the Argentine government to influence both this litigation and Pan American's second-filed action in Argentina." App. 5a n.4. Solicitation of government intervention in litigation is legitimate. In Argentina as in this country, persons are free to ask the Government to intervene in court cases, just as litigants in this country solicit the legal support of federal agencies or the Department of Justice in the federal and state courts. The state court had no basis for suggesting that the official position of the Argentine government in court filings should be disregarded because it sides with the interests of one litigant over another.

to avoid subsequent awards of damages, will be forced either to conform its construction and engineering methods to whatever "international standards" the Delaware court sees fit to endorse, or perhaps to forgo development and construction where the risks are too great. The proper construction and production practices for hydrocarbon development in Argentina, and the respective rights and duties of concessionaires and surface owners, are matters of vital Argentine sovereign interest that should not be determined by Delaware courts. Indeed, the Argentine Government has emphasized that the issue of compensation of surface owners is one of the fundamental reasons why Argentine courts have exclusive jurisdiction over this matter. App. 64a.[4]

The Delaware Supreme Court was also improperly dismissive of the Argentine government's conclusion "that Argentine jurisdiction is absolute and exclusive to decide on any claims" related to the relationship between concessionaires and surface owners. App. 116a (Letter to State Department); App. 66a. In proceedings before the Argentine Supreme Court, the Argentine Attorney General cited the conditions which independently establish the exclusive jurisdiction of the Argentine federal courts: namely, that the Argentine Hydrocarbon and Natural Gas laws govern the dispute, and that there is a federal interest in the dispute triggering Argentine federal jurisdiction because hydrocarbon

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[4] Indeed, respondents "do not concede the inapplicability of Delaware law," Resp. Br. at 24, and the Delaware Supreme Court left the issue open, despite the Court of Chancery's finding that Argentine law applied. Respondents thus will argue that *Delaware* law governs Pan American's hydrocarbon development in Argentina notwithstanding (as their own expert acknowledges) that Argentine legislation provides "substantive rules of decision for the resolution of issues raised by the facts alleged in the complaint." App. 167a (Litvinoff Aff. ¶ 11). *See also* App. 98a (Naón Aff. ¶ 51) (noting that respondents' "claims cannot be decided without determining the scope and limitations of [FSB's] real property rights on the surface of the Acambuco Area . . . vis-à-vis the rights of [Pan American]").

fields are "federal public utilities" and there is a strong federal interest that the Argentine government's "legal powers be not impaired" and "the provision of an essential public service be not hampered." *Id.* at 65a, 66a. The Argentine Attorney General's position was corroborated by Dr. Naón's expert opinion that was submitted in the Court of Chancery. Dr. Naón set forth in great detail the exclusive jurisdiction created by Federal Law 48 on the Jurisdiction and Competence of National and Federal Courts, and discussed how the rules of exclusive jurisdiction apply to substantive mandatory laws that are closely associated with the public or national interest of the forum (Ley de Policia, like the Hydrocarbon Law). Moreover, Dr. Naón confirmed that "mixed actions," those "relating to personal rights that only come into existence because of the rights *in rem* held by the claimant in connection with an immovable," are subject to the Argentine courts' exclusive jurisdiction. App. 87a (Naón Aff. ¶ 31).

The Delaware Supreme Court simply dismissed this analysis, relying on the cursory affidavit of respondents' expert, Dr. Litvinoff, which baldly asserts that the Argentine constitution and codes do not directly provide for exclusive jurisdiction. But Dr. Litvinoff concedes that if the Argentine Supreme Court finds that Argentina has a "substantial direct and immediate interest in the matter," then the case belongs to the exclusive jurisdiction of the Argentine courts. See App. 104a; *id.* at 105a (agreeing that if the Argentine Supreme Court finds the federal or provincial governments to be "proper parties to this dispute," then "the dispute is properly heard in the Argentine federal courts")). It is remarkable that the Delaware Supreme Court would simply call it a draw between party experts and hold that petitioner failed to show exclusive jurisdiction, and more remarkable still that it would credit the views of Dr. Litvinoff over the official position of the Argentine government presented to that Nation's court by the Argentine Attorney General.

This case vividly illustrates why "matters bearing on the Nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'" *First Nat'l City Bank*, 462 U.S. at 622 n.11 (quoting *Sabbatino*, 376 U.S. at 425). The decision below has deepened an existing judicial split on what deference is owed as a matter of federal common law to foreign sovereign interests when a court is deciding whether to exercise jurisdiction over a foreign dispute. This Court should remedy the conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF DELAWARE

No. 543,2003

CANDLEWOOD TIMBER GROUP, LLC and Forestal Santa Barbara SRL, Plaintiffs Below,
Appellants,

v.

PAN AMERICAN ENERGY, LLC, Defendant Below,
Appellee.

Submitted April 27, 2004
Decided Oct. 4, 2004

Upon appeal from the Court of Chancery. Affirmed in Part, Reversed in Part and Remanded.

Before HOLLAND, BERGER and JACOBS, Justices.

JACOBS, J.

The plaintiffs below, Candlewood Timber Group LLC ("Candlewood") and Forestal Santa Barbara SRL ("FSB"), [1] appeal from an order of the Court of Chancery dismissing their complaint against the defendant below, Pan American Energy, LLC ("Pan American"), for lack of subject matter jurisdiction and on the ground of *forum non conveniens*.[2] We affirm the dismissal insofar as it is predicated on lack of subject matter jurisdiction, but reverse the dismissal insofar

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[1] Except where the context requires a more specific reference, Candlewood and FSB are referred to collectively in this Opinion as "Candlewood."

[2] *Candlewood Timber Group, LLC v. Pan Am. Energy LLC*, C.A. No. 20135, 2003 WL 22417235 (Del. Ch. Oct. 22, 2003).

as it is based on *forum non conveniens.* We also remand the case with directions that it be transferred from the Court of Chancery to the Superior Court.

FACTS

Procedural History

Candlewood is a Delaware limited liability company that is engaged in a venture with its wholly-owned and controlled Argentine subsidiary, FSB, to sell wood products derived from South American forests that are managed consistently with international standards of sustainable forestry.[3] FSB is the vehicle through which Candlewood purchased approximately 250,000 acres of forest land, including 70,000 acres that are located in the Province of Salta, Republic of Argentina.

Pan American, a Delaware limited liability company that engages in oil and gas extraction, is the second largest hydrocarbon producer in Argentina. Pan American is the majority owner and the operator of a consortium of companies that were granted concessionary rights by the Argentine Republic (which owns all of the oil and gas rights in Argentina) to extract oil and gas in the Province of Salta. That concession covers the land owned by FSB in the Salta Province. The majority owner of Pan American is a subsidiary of BP p.l.c., and the minority owner is Bridas Corporation, an oil company controlled by one of Argentina's wealthiest families.

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[3] According to Candlewood's complaint, sustainable forestry is designed to foster the renewal of prime forest resources and employment opportunities for local residents. It operates to preserve the long term environmental benefits of forest lands while realizing the economic and social values of marketable timber. Sustainable forestry involves the extraction of such timber from prime forest lands, while preserving intact the forest and its valuable environmental habitats and biodiversity.

Pan American sought permission from FSB to extract the oil and gas from underneath FSB's land. At Candlewood's direction, FSB gave Pan American permission to enter FSB's forest land, conditioned on Pan American's written agreement that it would (among other things) purchase comprehensive liability insurance and indemnify FSB against any damage Pan American caused to the property. Thereafter, according to Candlewood's complaint, Pan American violated those obligations by undertaking a drilling program that inflicted massive unremediated property damage to FSB's land, thereby making it impossible for Candlewood to obtain the environmental certifications required for their sustainable forestry business.

On January 28, 2003, Candlewood filed an action against Pan American in the Court of Chancery for monetary and injunctive relief. On March 4, 2003, Candlewood filed an amended complaint. The following day, Pan American filed an original action in the Supreme Court of Argentina against Candlewood and FSB. In its Argentine action, Pan American sought a declaration that the parties' dispute was subject to the original jurisdiction of the Argentine Supreme Court, the Argentine federal courts, or the Argentine provincial courts. In support of its application, Pan American alleged that the "mere existence of the Delaware action," and the threat of restraining orders had caused Pan American to suspend its drilling operations, and that orders of a Delaware court might interrupt its operations and force Pan American to breach its supply contracts. Pan American also sought to join the Nation of Argentina and the Province of Salta as third parties, so as to create original jurisdiction in the Argentine Supreme Court.

Pan American responded to Candlewood's Delaware Chancery complaint by filing a motion to dismiss or, alternatively, to stay the Delaware action in favor of its Argentine action. Thereafter, Candlewood filed a second amended complaint

that dropped all its requests for injunctive relief, including relief that would require supervision of Pan American's conduct on FSB's land in Argentina. Candlewood and FSB did, however, continue to assert claim for specific performance of Pan American's contractual obligation to purchase liability insurance.

In their second amended complaint, which is the operative complaint for purposes of this appeal, Candlewood included claims for breach of contract, negligence, fraud, tortious infringement of property rights, and tortious interference with business relations. Candlewood's contract claim alleges that Pan American breached its obligation under the extraction permits and accompanying correspondence, and that "Candlewood and FSB are entitled to indemnification for their losses, and [to] specific performance to compel Pan American to purchase comprehensive liability insurance. . . ." Candlewood's request for specific performance is the only reference in its complaint to an equitable remedy.

On May 30, 2003, Candlewood filed a motion in the Court of Chancery to restrain Pan American from prosecuting its Argentine action. Candlewood also moved for a declaration that the Court of Chancery is the appropriate forum to adjudicate their claims. On June 26, 2003, after a hearing, the Court of Chancery entered an order restraining Pan American from interfering with the prosecution of Candlewood's motion for a declaration that the Court of Chancery was the proper forum to adjudicate their claims.

Meanwhile, on June 23, 2003, Pan American filed a second action in an Argentine provincial court, seeking partial expropriation of FSB's land. On September 12, 2003, after admitted discussions and a meeting among representatives of Pan American and the Argentine Government, the Nation of Argentina filed a pleading in Pan American's Argentine Supreme Court action, attacking the jurisdiction of the Delaware courts. In that pleading, the Nation of Argentina,

referencing the "permanent injunctions" being sought in Candlewood's original complaint, claimed that the "basic institutions of the Nation [were] at risk" because of "the possibility that gas production in the Acambuco area could be . . . affected" by "one or more rulings by a foreign court."[4] That pleading did not disclose to the Argentine Court that Candlewood was seeking only damages based on common law claims arising out of private contracts with Pan American. Nor did that pleading disclose that Candlewood had previously informed the Court of Chancery (and Pan American) that they were "not seeking any injunctive relief requiring supervision of Pan American's conduct on the land in Argentina."[5]

Facts Relating To Forum Non Conveniens Motion

The facts relating to Pan American's motion to dismiss Candlewood's Court of Chancery action are uncontroverted.

Pan American has tremendous resources at its disposal. Describing itself as a "leading regional player" in oil and gas production with operations throughout the Southern Cone of

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[4] Pan American appears to have used its access to the highest levels of the Argentine government to influence both this litigation and Pan American's second-filed action in Argentina. In connection with the preliminary injunction hearing in the Court of Chancery, Pan American wrote a letter to Argentina's Secretary of Foreign Relations, met with the legal advisor to the Ministry of Foreign Affairs, wrote a letter to the Secretary of Energy, and spoke with the Secretary of Energy's legal advisors. Officials from both ministries wrote letters in support of Pan American's position, which Pan American submitted to the Court of Chancery. Pan American also met with the legal advisor to the Argentine Ministry of Foreign Affairs, after which the Nation of Argentina appeared in Pan American's second-filed Argentine action and attacked the jurisdiction of the Delaware courts.

[5] The reason for that omission, Candlewood contends, is that Pan American did not inform the relevant Argentine governmental officials that Candlewood intended to seek only money damages relief.

South America, Pan American is the principal vehicle for BP's oil and gas activity in Argentina, Bolivia, Brazil, Chile and Uruguay. Pan American's certified reserves approach 2 billion barrels of oil equivalent, and its exploration block portfolio approximates 5 million net acres.

Pan American conducts significant business in the United States. When asked in an interrogatory to identify which of its employees traveled to the United States on business, Pan American replied that many of its employees "travel abroad on a regular basis, including to the United States." Pan American also stated that it "does not contend that it would be an undue hardship for some of its employees to travel to the United States, but it would be unduly burdensome to seek to identify each person who has traveled to the United States and the dates of such travel."

To conduct its international business, Pan American regularly agrees to litigate in the United States. Its gas export contracts and crude oil sales contracts provide exclusively for dispute resolution in the United States, and its financial agreements specify either English or United States fora. On three occasions in recent years Pan American has been a litigant in the United States, including in a Court of Chancery trial in which Pan American successfully defended a claim that it be required to post $41 million in collateral under an indemnity agreement.[6]

During the discovery proceedings that ultimately resulted in the decision on Pan American's motion to dismiss, Pan American submitted a single "Affidavit Re-Location and Access to Witnesses and Evidence." That affidavit identified no potential witnesses, documents, or evidence outside of Pan American's control, or any reason why Pan American would be unable to present factual evidence respecting damage to

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[6] *Ins. Co. of the State of Pa. v. Pan Am. Energy, LLC*, C.A. No. 19629, 2003 WL 1432419 (Del. Ch. Mar. 19, 2003).

FSB's property through expert testimony, assisted by visual aids. The discovery also revealed that of the six Pan American employees who were identified as having the most knowledge about Pan American's activities on FSB's land, four had traveled internationally on business and three had traveled to the United States.

Summary of the Court Of Chancery Opinion

In an opinion handed down on October 22, 2003, the Court of Chancery granted Pan American's motion to dismiss on the grounds of lack of subject matter jurisdiction and, alternatively, *forum non conveniens.*

As for subject matter jurisdiction, the Court held that none of Candlewood's claims was equitable in character and that although on its face the complaint purported to seek an equitable remedy—specific performance of Pan American's contractual obligation to purchase a policy insuring against damage to FSB's land—in reality, Candlewood and FSB's claim was one at law for money damages. Because the harm to the land had already occurred, the remedy would have to take the form of a monetary award, whether or not Pan American had purchased an insurance policy. Therefore, because the complaint did not allege that the remedy at law was inadequate and specific performance was not necessary for the relief sought by Candlewood, the Court dismissed the complaint for lack of subject matter jurisdiction.

To summarize meaningfully the Court of Chancery's *forum non conveniens* rulings, it is helpful to discuss first the legal standard for dismissal under the *forum non conveniens* doctrine. Under Delaware law the moving party must demonstrate, with particularity, that being required to litigate in Delaware would subject it to overwhelming hardship.

As this Court stated in *Warburg, Pincus Ventures, L.P. v. Schrapper:*

> Our jurisprudence is clear that a complaint will not be dismissed on the ground of *forum non conveniens* without a showing of overwhelming hardship. While this standard is not "preclusive," it requires a defendant to show that the case "is one of the rare cases where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in manifest hardship to the defendant."[7]

In assessing whether or not overwhelming hardship has been shown, Delaware courts employ an analysis predicated upon the six so-called *Cryo-Maid"* factors,[8] which are:

> (1) the relative ease of access to proof;
>
> (2) the availability of compulsory process for witnesses;
>
> (3) the possibility of a view of the premises;
>
> (4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction;
>
> (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and
>
> (6) all other practical problems that would make trial of the case easy, expeditious, and inexpensive.[9]

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[7] 774 A.2d 264, 267 (Del.2001) (footnotes omitted).

[8] Referring to *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del.1964).

[9] *Warburg, Pincus*, 774 A.2d at 267; *Ison v. E.I. DuPont de Nemours & Co., Inc.*, 729 A.2d 832, 837-38 (Del.1999).

In its opinion, the Court of Chancery identified these legal standards accurately. The Court also appropriately framed the issue, as being "not whether Pan American has shown that Argentina is a better forum for the litigation, but whether Pan American has shown with particularity, through one or more of the *Cryo-Maid* factors, that litigating in Delaware constitutes an overwhelming hardship."[10] Having analyzed each of the *Cryo-Maid* factors, the Court of Chancery ruled that all of them favored Pan American, reasoning as follows:

> *Access To Proof:* The Court found that (1) all the witnesses, physical evidence and documents relating to Pan American's defense are located in a remote area of Argentina, from which traveling to Delaware to litigate would be "extremely inconvenient;" (2) the five employees most knowledgeable of Pan American's activities in Argentina live in Argentina, speak minimal English, and are so critical to normal business operations that if those employees are required to travel to Delaware for trial, Pan American's business will suffer "significant disruption;" (3) the relevant documents are virtually all in Spanish and are in active use in Argentina; and (4) securing live testimony of the witnesses and producing English translations of the relevant documents in Delaware will entail "substantial burdens" to Pan American, and as a practical matter may cause Pan American to "suffer the deprivation of live testimony and, resultantly . . . have difficulty presenting rebuttal testimony."[11]
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> *Compulsory Process for Witnesses:* The Court of Chancery found that it "may have limited powers to compel access to witnesses and documents," because although Argentina is a signatory to the Hague Convention To

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[10] *Candlewood,* 2003 WL 22417235 at *3.

[11] *Id.*

The Taking Of Evidence Abroad In Civil And Commercial Matters, the Argentine Republic will not execute Letters of Request for the purpose of obtaining pre-trial discovery of documents. Because of that reservation to the Hague Convention, the Court of Chancery stated that "Pan American may have no pre-trial discovery."[12]

View of The Premises: The Court of Chancery found that "the need to view the premises . . . is greater" than in cases that do not involve injury to real property. Although video is a substitute, "it is only that--a substitute," for which reason (the Court concluded) "Pan American will clearly suffer difficulties if forced to litigate in Delaware because the finder of fact cannot view the premises."[13]

Delaware's Interest in the Litigation: The Court found Delaware's interest in a dispute over injury to land in Argentina is "minimal," but that:

> Argentina, as owner of all oil and gas resources in Argentina, has a bona fide interest in any compensation paid to FSB due to damage allegedly caused by Pan American's operations pursuant to extraction rights granted to it by Argentina. This interest is not speculative and is evidenced by the Nation of Argentina and Province of Salta's submissions before the Supreme Court of Argentina. A decision in this action will likely implicate Argentina's right to regulate access to surface property that lies above government owned oil and gas fields. Furthermore, a decision will implicate Argentina's economic interests because a decision adverse to Pan American may reduce the revenues Argentina derives from Pan American's extraction activities. [Given] the signifi-

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[12] *Id.* at *4.

[13] *Id.*

> cant interests of Argentine governmental entities, the Argentine courts may have *exclusive* jurisdiction over this dispute . . . [that] . . . may independently deprive this Court of its jurisdiction. Regardless, Argentina's significant interest in this litigation and Delaware's limited interest in this litigation, counsels judicial discretion strongly in favor of dismissal.[14]

Other Pending Litigation: The Court found that an action "similar to this litigation" was pending before the Argentine courts, which are as fully capable as the Delaware courts of resolving disputes of this nature. Actually, the Argentine courts may be more capable (the Court of Chancery opined), since they can exercise jurisdiction over the Nation of Argentina and the Province of Salta.

Other Practical Problems: Lastly, the Court of Chancery identified a practical problem. FSB had previously executed and delivered to Pan American, Receipts for Indemnification in exchange for compensation that Pan American had paid to FSB for damage caused by its seismic surveying activity on FSB's property. The Receipts for Indemnification contained an exclusive Argentine forum selection clause. That created a practical problem, the Court of Chancery found, namely that because only the Argentine courts had jurisdiction over damage claims resulting from seismic activities, "it will be necessary to delineate clearly the line between the damage caused by the seismic activities and the damage caused by oil and gas extraction . . . . a complicated task that could prove unmanageable. Argentine courts would not face this same definitional problem and could hear all issues surrounding Pan American's activities."[15]

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[14] *Id.*, 2003 WL 22417235 at *5 (emphasis in original).

[15] *Id.* at *6.

Taking these factors into consideration, the Court of Chancery concluded they showed, in the aggregate, that:

> [L]itigating this dispute in Delaware would constitute an overwhelming hardship to Pan American. Delaware has little or no interest in resolving this dispute. Plaintiffs purchased real estate in Argentina. They formed an Argentine entity to develop the resources located in Argentina. They negotiated and executed contracts in Argentina. The breach of these contracts, and the alleged tortious conduct attendant thereto, all occurred in Argentina. Argentine law will govern this dispute. Finally, Argentine governmental authorities have expressed a direct interest in this controversy. Litigating this matter in Delaware, rather than in Argentina, defies common sense.[16]

The Subject Matter Jurisdiction Issue

The first issue raised on this appeal is whether the Court of Chancery erred in dismissing the complaint for lack of subject matter jurisdiction. On questions of subject matter jurisdiction, the applicable standard of review by this Court is whether the trial court correctly formulated and applied legal principles.[17] The scope of our review is *de novo.*[18]

As Delaware's Constitutional court of equity, the Court of Chancery can acquire subject matter jurisdiction over a cause in only three ways, namely, if: (1) one or more of the plaintiff's claims for relief is equitable in character,[19] (2) the

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[16] *Id.*

[17] *Sanders v. Sanders*, 570 A.2d 1189, 1190 (Del.1990).

[18] *Taylor v. LSI Logic Corp.*, 715 A.2d 837, 839 (Del.1998) (citing *Sanders v. Sanders*, 570 A.2d at 1190).

[19] 10 *Del. C.* § 341 ("The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity."); *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734 (Del.1983).

plaintiff requests relief that is equitable in nature,[20] or (3) subject matter jurisdiction is conferred by statute. Here, as the Court of Chancery correctly observed, Candlewood asserts no equitable claims for relief, nor does it advance any claim under a statute that vests jurisdiction in the Court of Chancery. The only claims that Candlewood asserts are common law claims sounding in tort and contract. Accordingly, the sole basis for equitable jurisdiction is that Candlewood's complaint seeks equitable relief, *viz,* specific performance of Pan American's contractual obligation to obtain liability insurance covering damage caused to FSB's property by Pan American's extraction activities.

Although specific performance is an equitable remedy upon which equity jurisdiction might be predicated, that is true only if the complaint, objectively viewed, discloses a genuine need for such equitable relief. The fact that a complaint contains a prayer for an equitable remedy, without more, does not conclude the jurisdictional analysis. In deciding whether or not equitable jurisdiction exists, the Court must look beyond the remedies nominally being sought, and focus upon the allegations of the complaint in light of what the plaintiff really seeks to gain by bringing his or her claim.[21] To say it differently, the appropriate analysis requires a "realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate."[22]

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[20] 10 *Del. C.* § 342 ("The Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State."); *Heathergreen Commons Condo. Ass'n. v. Paul*, 503 A.2d 636 (Del.Ch.1985).

[21] *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586 (Del.1970); *Hughes Tool, Inc. v. Fawcett Publ'n Inc.*, 297 A.2d 428 (Del.Ch.1972), *rev'd on other grounds*, 315 A.2d 577 (Del.1974).

[22] *McMahon v. New Castle Assoc.*, 532 A.2d 601, 603 (Del.Ch.1987).

Applying those principles to Candlewood's complaint, the Court of Chancery concluded that it did not have equitable subject matter jurisdiction, because the plaintiffs failed to allege that they had no adequate remedy at law, and also (and more importantly) because:

> Even if the plaintiffs had alleged that they had an inadequate remedy at law, a realistic assessment of whether money damages are sufficient to remedy the alleged breach of contract demonstrates that such an allegation would be a facade. The plaintiffs seek to require Pan American to purchase an insurance policy covering damage to their property, damage that has already been inflicted by Pan American's actions. Even if Pan American had such an insurance policy, it would presumably direct monetary payment to the plaintiffs if damage was done to the property-monetary payment that plaintiffs can recover as damages without resort to the extraordinary remedy of specific performance. In fact, the complaint itself demonstrates that there is an adequate remedy at law; the complaint seeks money damages for those harms that would have been covered by the insurance policy that Pan American allegedly never purchased. Because plaintiffs can adequately seek monetary damages in a court of law for Pan American's alleged breach of contract, this Court cannot grant specific performance and, hence, does not have jurisdiction to hear and decide this matter.[23]

We agree with that analysis. The Court of Chancery did not err in applying legal precepts or in concluding that it did not possess subject matter jurisdiction to adjudicate Candlewood's claim. Accordingly, if Delaware is a proper forum for this dispute, then the court that would have subject matter jurisdiction is the Superior Court.

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[23] *Candlewood*, 2003 WL 22417235 at *2.

That brings us to the second question, which is whether the Court of Chancery erred in determining, under *forum non conveniens* principles, that the only proper forum for this dispute is Argentina. We conclude, for the reasons next discussed, that the Court did so err.

The Forum Non Conveniens Issue

This Court has repeatedly reaffirmed that a defendant that seeks the dismissal of a first-filed Delaware action on the ground of *forum non conveniens* "must establish with particularity that [it] will be subjected to overwhelming hardship and inconvenience if required to litigate in Delaware."[24] That standard imposes a "heavy burden" that a defendant will meet "only in a 'rare case.'"[25]

The Court of Chancery articulated the proper standard for a *forum non conveniens* dismissal, but it applied that standard incorrectly to the facts of the case, for three reasons. *First,* the Court imported into its analysis a consideration that is legally irrelevant and untethered to any hardship to Pan American. *Second*, the Court made *Cryo-Maid*-related factual findings that were not adequately supported by the record. *Third,* the record discloses no other basis to support a finding that Pan American would suffer overwhelming hardship if required to litigate in Delaware. To the contrary, the undisputed facts of record only further confirm that Pan American would not suffer any significant hardship.

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[24] *Ison v. E.I. duPont de Nemours & Co.*, 729 A.2d 832, 838 (Del. 1999); *Mar-Land Indus. Contractors, Inc. v. Carribean Petroleum Ref., L.P.*, 777 A.2d 774, 778 (Del.2001); *Warburg, Pincus Ventures L.P. v. Schrapper*, 774 A.2d at 267; *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1199 (Del.1997).

[25] *Mar-Land*, 777 A.2d at 778 (quoting *Ison*, 729 A.2d at 842).

1. *The Relative Interests of Argentina And Delaware in This Controversy*

The factor found to weigh most heavily in favor of the Court of Chancery's determination that litigating in Delaware would constitute an overwhelming hardship to Pan American, was that Argentina has a far greater interest in the controversy than does Delaware. The predominate weight given that factor emerges clearly from the Court's opinion. Immediately after finding that overwhelming hardship had been established, the Court of Chancery (i) stated that "Delaware has little or no interest in resolving this dispute;" (ii) observed that all the parties, the contracts and the alleged wrongful conduct were located in or occurred in Argentina and that Argentina law would apply; and then (iii) concluded that "Argentine governmental authorities have expressed a direct interest in this controversy."[26]

The problem with this analysis is that factors that bear on choice of law or upon the relative interests of Delaware and Argentina in adjudicating this dispute have no logical relevance to the critical issue, which is whether Pan American will suffer overwhelming hardship if required to litigate in Delaware. Because the defendant has the burden to demonstrate "overwhelming hardship" from litigating a first-filed case in Delaware, this Court has previously held that "whether an alternative forum would be more convenient for the litigation, or perhaps a better location, is irrelevant[;]"[27] and that "the trial court is not permitted to compare Delaware, the plaintiff's chosen forum, with an alternate forum and decide which is the more appropriate location for the dispute to proceed."[28] That is what prompted this Court, in *Mar-Land*

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[26] *Candlewood*, 2003 WL 22417235 at *6.

[27] *Mar-Land*, 777 A.2d at 779.

[28] *Id.*, 777 A.2d at 781 ("the Superior Court improperly weighed the plaintiff's chosen forum versus the defendant's preferred forum."); *Tay-*

Industries Contractors, Inc. v. Caribbean Petroleum Refining, L.P., to reverse a dismissal on *forum non conveniens* grounds, and to hold that "the Superior Court improperly weighed the plaintiff's chosen forum versus the defendant's preferred forum, a balancing analysis not contemplated by this Court's *forum non conveniens* jurisprudence."[29]

Even if Argentine law is found to be applicable, "the application of foreign law is not sufficient reason to warrant dismissal under the doctrine of *forum non conveniens*."[30] In *Warburg, Pincus Ventures v. Schrapper*, this Court rejected the argument that "some lesser hardship standard applies" where the plaintiff is not a Delaware citizen and where "the defendant's 'only connection' to Delaware is its status as a Delaware business entity."[31] Affirming the denial of a *forum non conveniens* motion, the *Warburg* Court found that the defendant "had not established with particularity that it would face overwhelming hardship if required to litigate in Delaware[,]" observing that:

> All of the activities that are the basis of [plaintiff's] complaint occurred outside of the United States. The negotiations between the parties took place in Germany and England, which is also where . . . all of the evidence is located. Similarly, [plaintiff's] alleged damages involve interference with his relationships with various German entities. . . . Warburg argues . . . that either German law or possibly English law would apply to this action. . . .[32]

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lor, 689 A.2d at 1197 (holding that the trial court improperly dismissed on grounds that a foreign court "would be a 'more appropriate forum'").

[29] *Mar-Land*, 777 A.2d at 781.

[30] *Taylor*, 689 A.2d at 1200.

[31] 774 A.2d at 268, 269.

[32] 774 A.2d at 267.

By injecting an irrelevant factor into the *forum non conveniens* analysis, the Court of Chancery lowered the applicable standard. It also minimized a significant Delaware interest in the lawsuit, which is to make available to litigants a neutral forum to adjudicate commercial disputes against Delaware entities, even where the dispute involves foreign law and the parties and conduct are centered in a foreign jurisdiction. Where, as here, the Delaware action is first-filed, our jurisprudence views that interest to be sufficiently important as to impose upon the moving defendant the "heavy burden" of demonstrating overwhelming hardship from being required to litigate in Delaware.[33]

The governmental interests of Argentina would be a relevant factor had Pan American moved to dismiss under Chancery Court Rule 19, on the basis that the Argentine governmental entities are indispensable parties, such that Pan American would be prejudiced if this case proceeded in Delaware without the presence of those Argentine governmental entities. Pan American did advance the argument that the Argentine courts have exclusive jurisdiction, and both sides briefed that issue; but rather than decide that juris-

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[33] The Court of Chancery relied in part upon *IM2 Merchandising & Mfg., Inc. v. Tirex Corp.*, C.A. No. 18077, 2000 WL 1664168 (Del.Ch. Nov.2, 2000). That case, which was decided before *Warburg, Pincus* and *Mar-Land*, was cited by the Court of Chancery for the proposition that "Argentina's significant interest in this litigation, and Delaware's limited interest . . . counsels judicial discretion strongly in favor of dismissal." *Candlewood*, 2003 WL 22417235 at *5. But *IM2* turned less on the interests of a foreign forum than on the financial hardship facing the Quebec-based defendant, which had "lost a good deal of money and [was] apparently in default of its tax obligations," and could not "easily bear" the "markedly increased" costs of litigating in Delaware. *Im2*, 2000 WL 1664168 at *9. Pan American faces no such hardship, and it admittedly "does not contend that it would be an undue hardship for some of its employees to travel to the United States." Def.'s Resp. to Pl.'s First Set of Interrogs., Appellant's Appendix at 339.

dictional issue directly, the Court of Chancery folded that question into the "Delaware interest in the litigation" factor of its *forum non conveniens* analysis.

It is within that framework that the Court of Chancery concluded that for it to entertain this breach of contract and tort action against a private party, "will likely implicate Argentina's right to regulate access to surface property . . . [and] . . . will implicate Argentina's economic interests," and also that "[b]ecause of the significant interests of Argentine governmental entities, the Argentine courts *may* have *exclusive* jurisdiction over this dispute . . . [that] *may* independently deprive this Court of its jurisdiction."[34] Because that concern was untethered to any asserted hardship to Pan American, overwhelming or otherwise, the Court of Chancery erred by injecting the exclusive jurisdiction issue into a *forum non conveniens* analytic framework.

2. *Erroneous* Cryo-Maid *Factual Findings*

In its opinion the Court of Chancery considered and assessed the six factors prescribed by *Cryo-Maid* and its progeny, that are legally relevant to a *forum non conveniens* analysis. Regrettably, the Court's conclusions relating to several of those factors were based upon conclusory affidavits that Pan American had submitted. The Court's conclusions failed to take into account controverting evidence submitted by Candlewood as well as critical admissions by Pan American. This Court will not upset a trial court's factual findings if they are supported by the record and are the product of an orderly and logical deductive process.[35] Here, several of the Court of Chancery's critical findings were not adequately supported by the record and, thus, were erroneous.

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[34] 2003 WL 22417235 at *5 (italics in original, underscoring added).

[35] See *Moss v. Prudential-Bache Sec., Inc.*, 581 A.2d 1138, 1139-40 (Del.1990).

• Access To Proof

Relying solely on two paragraphs in an affidavit describing the location of certain Pan American employees and documents, the Court of Chancery found that Pan American's expected defense would depend on "witnesses, physical evidence and documents . . . located in a remote area of Argentina;" that travel for these witnesses to Delaware for trial would be "extremely inconvenient" and cause Pan American to "suffer significant disruption;" and that producing English translations of relevant documents in Delaware "will entail substantial burdens to Pan American" and *may* cause Pan American to "suffer the deprivation of live testimony" and to "have difficulty presenting rebuttal testimony."[36]

These findings lack proper record support, and they ignore admissions by Pan American that significantly, if not fatally, undercut Pan American's assertions. Pan American's affidavit amounts essentially to bare conclusions that do not constitute a "particularized showing that witnesses, documents, or other evidence necessary to defend the allegations contained in [Candlewood's] complaint cannot be brought to or otherwise produced in Delaware."[37] Pan American did not identify any damages evidence that could not be assimilated and presented in Delaware by an expert. Nor did Pan American show why it needs any fact testimony (whether live or by deposition) from any Pan American employee concerning the effect of its extraction activities upon FSB's land.

The Court of Chancery's findings also do not take into account admissions by Pan American that significantly undercut its assertions of hardship. In its response to inter-

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[36] *Candlewood*, 2003 WL 22417235 at *3-6.

[37] *Mar-Land*, 777 A.2d at 781.

rogatories, Pan American admitted that "it does not contend that it would be an undue hardship for some of its employees to travel to the United States."[38] Pan American also admitted that four of the six employees referenced in its affidavit as most knowledgeable, had traveled internationally on business in recent years, and that three had traveled to the United States. Finally, Pan American admitted that it customarily enters into contracts that include forum selection clauses that require it to litigate in the United States and the United Kingdom, and that recently it had defended a case in the Court of Chancery. The Court of Chancery's opinion does not come to grips with, or acknowledge, those admitted facts.

• Availability of Compulsory Process

Regarding this factor, the Court found that "[a]s a result of Argentina's reservation to the Hague Convention, Pan American may have no pre-trial discovery." Aside from the fact that Pan American never made that argument in the Court of Chancery (and its brief on appeal cites no record evidence to support this claim), Pan American never identified any potential witnesses or documents that are not under its control, or any third party witness in Argentina or elsewhere from whom it would wish to obtain discovery. Nor did Pan American suggest that there exists potential evidence in Argentina or elsewhere that Pan American might want or be unable to obtain in discovery. Consequently, there is no identified record support for the Court of Chancery's finding that Pan American "may have no pre-trial discovery."

• View of the Premises

Although Candlewood attached to its complaint its expert's reports that contain various charts and drawings, Pan American asserted in the Court of Chancery, and urges on this appeal, that this action "unquestionably requires that the

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[38] *See*, note 33, *supra*.

finder of fact undertake an up close and detailed view of the premises at issue."[39] Pan American did not explain how its expert or factual presentation would be inhibited by the absence of a view of the premises, or how an "up close and detailed view" would help the Court assess how many hundred acres of forest were taken out of production, or how many hundreds of thousands of square meters of earth were excavated. Pan American also made no effort to explain why video technology and other visual aids would be less informative than an in-person expedition.

Despite the lack of a particularized record on these issues, the Court of Chancery appears to have accepted uncritically Pan American's assertion that "this factual dispute cannot come to resolution without a view of the premises and, therefore, it will suffer overwhelming hardship if forced to litigate here."[40] Neither Pan American nor the Court cited any case in which forced reliance on video or other visual aids, in lieu of a personal inspection, was found to constitute a hardship.[41] The Court's finding on this factor lacks evidentiary and legal support.

• Whether The Controversy is Dependent Upon The Application of Delaware Law

The fourth *Cryo-Maid* factor is "whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of

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[39] Appellee's Ans. Br. at 19.

[40] *Candlewood*, 2003 WL 22417235 at *4.

[41] The Court of Chancery relied upon a pre-video-era case, in which a jury's view of real property years after its condemnation was deemed to be not misleading and prejudicial and a "valuable aid," chiefly because the jury otherwise would have "had to guess as to the surroundings and the neighborhood." *Woodlands Cemetery Co. v. U.S.*, 110 F.Supp. 704, 706 (E.D.Pa.1953).

another jurisdiction."[42] This factor weighs slightly, although not significantly, in Pan American's favor. The Court of Chancery found that Argentine law would apply to Candlewood's claims.[43] Candlewood disputes that finding, but even if Delaware law were applicable, it has not been shown that this case depends upon the application of Delaware law that more properly should be decided by Delaware courts. On the other hand, if Argentine law is found to apply, that alone "is not sufficient reason to warrant dismissal under the doctrine of *forum non conveniens*."[44]

Pan American has failed to articulate any hardship that would result from a Delaware court applying Argentine law. The expense and inconvenience of translating pertinent legal precedent, of retaining foreign lawyers, and of producing foreign law experts to testify at trial, has not been shown to be of material weight in an overwhelming hardship analysis in this particular case.[45] Accordingly, this factor, although favoring Pan American, falls far short of satisfying the standard for a *forum non conveniens* dismissal.

• Lack of A Prior Pending Action

Although the Court of Chancery found that "an action similar to this litigation . . . [is] . . . pending before the Argentine courts,"[46] the record shows that the Pan American lawsuits pending in Argentina are not "similar." No action was "pending" in Argentina at the time Candlewood filed this Delaware action asserting common law tort and contract claims for damage to property. Pan American's second-filed action in the Argentina Supreme Court does not seek a

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[42] *Ison*, 729 A.2d at 838.

[43] *Candlewood*, 2003 WL 22427235 at *4, n. 30.

[44] *Taylor v. LSI Logic, Inc.*, 689 A.2d at 1200; *Ison*, 729 A.2d at 838.

[45] See *Warburg, Pincus*, 774 A.2d at 271.

[46] *Candlewood*, 2003 WL 22417235 at *5.

declaration to the contrary, *i.e.*, that it is *not* liable to Candlewood for property damage. Pan American's lawsuit seeks only a declaration that its dispute with Candlewood is subject to the exclusive jurisdiction of specified Argentine courts.

Pan American's second Argentine lawsuit does not implicate Candlewood's Delaware claims either, because (i) that action does not seek a declaration of non-liability for damage to land resulting from expropriation, (ii) that action seeks only a partial court-ordered expropriation of FSB's land, and (iii) even if expropriation relief were granted, that would not affect Candlewood's claims, all of which would have arisen pre-expropriation. Thus, the Court's finding of an action "similar to this litigation" pending in Argentina lacks support in the record.

• Other Practical Problems

The "practical problem" identified by the Court of Chancery is that it will be difficult to distinguish between the extraction-related property damage claimed by plaintiffs in this action and the property damage resulting from Pan American's seismic activities for which FSB has already been compensated and given a release. That factor favored the Argentine forum, the Court of Chancery found, because Argentine courts would not face that definitional problem, whereas a Delaware court would.

That conclusion is erroneous, because whichever court hears and decides Candlewood's claims, whether in Delaware or Argentina, will be required to engage in the task of delineating between the two different sources of damage. This practical problem, to the extent it exists, does not depend on the locus of the litigation. That is, if this constitutes a hardship to Pan American (or to anyone else), it is not a hardship that results from litigating in Delaware. Accordingly, the finding that this factor favored Argentina rests on an incorrect premise.

For these reasons, the Court of Chancery's assessment of the *Cryo-Maid* factors, and its conclusion that those factors establish overwhelming hardship, are not adequately supported by the record.

3. *The Absence Of A Showing Of Overwhelming Hardship*

Although the foregoing analysis would be a sufficient basis, in and of itself, to conclude that Pan American failed to meet its *forum non conveniens* burden, we have searched the record for other significant evidence of hardship, but have found none. Indeed, all the relevant evidence points to the conclusion that Pan American is in no position to argue that being required to litigate in Delaware would inflict a hardship upon it.

Pan American is a corporation with vast economic resources. It engages in operations on an international scale. As previously noted, Pan American's operations cause it frequently to enter into oil and gas supply contracts that contain forum selection clauses which require Pan American to litigate in the United States. Those facts are flatly inconsistent with Pan American's claim of hardship, as is the fact that Pan American recently defended a litigation in the Court of Chancery.

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As earlier noted, it is our view that the real "driver" of the result reached by the Court of Chancery is the possibility that the Argentine courts have exclusive jurisdiction over the subject matter of the Delaware action. The parties argued both sides of that issue before the Court of Chancery and this Court. Had the Court of Chancery addressed this issue directly, as distinguished from treating it as a *Cryo-Maid* factor within the framework of a *forum non conveniens* analysis, a decision on that question, if favorable to Pan American's position, would have constituted an independent basis for dismissing the action.

Normally, we would remand the case to the trial court to decide that question in the first instance. But because all parties ask this Court to decide whether subject matter jurisdiction is concurrent or is vested exclusively in the Argentine courts, and because that issue is one of law and if resolved in favor of Pan American would result in an affirmance, we decide that question in the interests of judicial economy.[47]

The Exclusive Jurisdiction Issue

In limited circumstances as discussed below, Delaware courts will not exercise subject matter jurisdiction over a dispute that is predicated on foreign law where the foreign state has vested jurisdiction exclusively in its own courts.[48] The issue is whether Argentina has vested jurisdiction over this particular kind of dispute exclusively in its own courts. Pan American argues that Argentina has done that, because: (1) the Argentine Constitution vests exclusive jurisdiction in its courts over actions where the Argentine Nation or a Province is a party; (2) Argentine law vests exclusive jurisdiction in its courts (a) over disputes concerning real property, and (b) over disputes involving issues of environmental protection, especially where the rights and obligations of an oil and gas concessionaire are implicated; and (3) the dispute implicates issues of public policy which demand that exclusive jurisdiction be in Argentina.

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[47] This Court may decide any issue fairly presented to the trial court and a question not so presented if the interests of justice require review. Supr. Ct. R. 8; *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 647 (Del.1993).

[48] See *Taylor v. LSI Logic Corp.*, 715 A.2d 837 (Del.1998); see also *Ison v. E.I. DuPont de Nemours & Co., Inc.*, 729 A.2d 832, 838, n. 14 (Del.1999) (in *Taylor v. LSI Logic Corp.*, "[t]his Court affirmed the dismissal . . . finding that the Canadian law at issue actually required *adjudication* in a Canadian Court, leaving the Court of Chancery with no subject matter jurisdiction.")

On the question of whether exclusive jurisdiction has been vested in the Argentine courts, Pan American, as the proponent of that contention, has the burden of persuasion. We conclude that none of Pan American's arguments has merit and that Pan American has not met its burden. We further conclude that the claims for relief being asserted by Candlewood in Delaware are transitory claims that have not been localized under Argentine law, and over which the courts of Delaware have concurrent jurisdiction.

1. *The Demerit of Pan American's Exclusive Jurisdiction Arguments*

Pan American first argues that Article 117 of the Argentine Constitution confers *ab initio* jurisdiction to hear and decide all disputes involving the Argentine national government or a Province thereof. Even if correct, that proposition has no relevance to this Delaware action, because no claims are being asserted in Delaware against the Argentine national government or the Province of Salta. Nor does Pan American claim that those Argentine governmental entities are indispensable to a just adjudication of Candlewood's claims, within the meaning of Court of Chancery Rule 19.[49]

Similarly irrelevant is Pan American's second argument, which is that Argentine law vests exclusive jurisdiction in its

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[49] According to the unrebutted Affidavit of Professor Saul Litvinoff, one of Candlewood's foreign law experts, under Argentine law the Argentine nation or an Argentine province can only be made a party to litigation if they have "a direct, substantial and immediate interest in the merits of the litigation involved. A formal or indirect interest will not suffice." (Litvinoff Supplementary Aff., ¶¶ 3, 5). According to Professor Litvinoff, the Argentine government has no such direct, substantial or immediate interest, because this dispute does not involve title to minerals owned by the government, the government will not be directly affected by a money judgment against Pan American, and resolution of the dispute is based on clear rules of law, not discretionary principles of public policy. (*Id.*, at ¶¶ 5, 9).

courts over disputes concerning real property and disputes involving issues of environmental protection. That argument is not analytically helpful, because this dispute is about compensation for harm to privately-owned land, not about ownership rights to real property or issues involving protection of the environment. As set forth in Section 87 of the *Restatement (Second) Conflict of Laws* (1971), "[a] state may entertain an action that seeks to recover compensation for a trespass upon or harm done to land in another state." Comment a to that Section explains that "[s]uch an action does not seek to affect title to foreign land, as would a bill to quiet title[.]"[50]

Finally, Pan American relies upon a theory of its foreign law expert, Dr. Horacio A. Grigera Naón, that there are issues of public policy implicated in this dispute that require exclusive jurisdiction in Argentina. Dr. Naón's opinion, however, is disputed by an equally plausible opinion articulating the contrary view. According to Professor Litvinoff, there are no principles of public policy that affect the parties' legal rights, but even in cases that do involve the Argentine public interest, "this does not mean that the jurisdiction of Argentine courts is exclusive; thus, the fact that rules of public policy must be applied in the resolution of a particular case does not negate the existence of concurrent jurisdiction in other courts[.]"[51] Given these disputed expert opinions and

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[50] Consistent with the *Restatement* rule is Professor Litvinoff's affidavit testimony that under the Argentine Civil Code, "an action by the owner of immovable property against an oil and gas concessionaire for trespass, damage to property, or breach of contract can be brought in Argentina or abroad." (Litvinoff Supplementary Aff., ¶ 7). Pan American argues that ownership of an oil or gas concession is a "real" or "in rem" right, but this case does not involve Pan American's or FSB's title. While FSB owns real property, what is principally at issue here is compensation for damage to trees, use of earth, and interference with the plaintiffs' sustainable forestry business.

[51] *Id.*, at ¶ 10.

Pan American's inability to cite any Argentine legal authority supportive of its position—including any statute that purports to localize the claims being asserted here in the Argentine courts—we conclude that Pan American has not met its burden of establishing that jurisdiction over this dispute has been vested exclusively in the Argentine courts.

2. *Delaware's Concurrent Jurisdiction Over The Plaintiffs' Transitory Causes of Action*

Our conclusion does not rest solely upon Pan American's failure to carry its burden, however. The facts of record in this case, and the rules of law applicable thereto, affirmatively establish that Candlewood's claims against Pan American are transitory. By definition a transitory claim is one that can be brought in the jurisdiction where a defendant resides, in this case, Delaware.

As stated in Professor Moore's treatise, "[an] action is transitory, even though it may affect land, if the type of relief requested is personal in nature so that the court acts on the defendant's person or personal property, which is within its control, and not directly on the lands involved. . . . [M]ost types of actions are considered transitory even though the outcome of the litigation may affect property."[52] Consistent with that fundamental principle is the uncontroverted opinion testimony of Arthur Taylor Von Mehren, Story Professor of Law *Emeritus* at Harvard Law School. Professor Von Mehren states that the "contract and tort claims pled by the plaintiffs are today considered transitory in nature,"[53] and that "[n]o

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[52] *Moore's Federal Practice*, ¶ 110.20[2] (3rd ed.2002).

[53] Affidavit of Arthur T. Von Mehren, ¶ 12; *accord, Forest Products Co. v. Magistrelli*, 14 A.2d 397, 400 (Del.Super.1940) ("An action to recover damages for breach of contract is transitory[.]"); Eugene F. Scoles, et. al., *Conflict of Laws* 368 (3rd ed.2000) (stating that jurisdiction over tort claims respecting injury to real property "exists in the state that is the situs of the realty, and other states with which the defendant has a purposeful, related connection.")

contemporary legal order's law of contract or tort seeks to localize in principle actions sounding in tort or contract."[54]

Pan American does not straightforwardly confront this issue or address that analysis. Instead, it contends that this dispute is akin to that involved in *Taylor v. LSI Logic Corp.*, where this Court held that a Canadian statute (Section 241 of the Canada Business Corporations Act) which provided an "oppression remedy" for minority stockholders and authorized suit only in specified Canadian courts, deprived the Delaware courts of subject matter jurisdiction to grant the requested equitable relief that the plaintiff was seeking under that statute.[55] We disagree. *Taylor* undercuts Pan American's case rather than supports it.

Taylor is properly analyzed within the framework of the general rule that was first articulated in 1914 in *Tennessee Coal, Iron & R.R. Co. v. George*.[56] The issue in *Tennessee Coal* was whether an injured employee could bring suit against his employer in Georgia, under an Alabama statute that created tort liability for an employer if the employee suffered injury due to defective machinery. The Alabama statute also provided that relief under the statute could only be sought in an Alabama court. The United States Supreme Court held that the employee could bring suit under the statute in Georgia, because "the place of bringing the suit is not part of the cause of action—the right and remedy are not so inseparably united as to make the right dependent upon its

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[54] Von Mehren Aff., ¶ 23. Consistent with Professor Von Mehren's testimony on that point is that of Professor Litvinoff, who states that damage claims for breach of contract, tort and restitution under the Civil Code of Argentina against a private entity are similarly transitory. (Litvinoff Aff., ¶¶ 7-9; Litvinoff Supplementary Aff., ¶¶ 3-5).

[55] 715 A.2d 837, 842 (Del.1988).

[56] 233 U.S. 354, 34 S.Ct. 587, 58 L.Ed. 997 (1914).

being enforced in a particular tribunal."[57] Observing that for various practical reasons a plaintiff might want to bring suit "in a state other than where the injury was inflicted," the Court held that:

> "[A] state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action."[58]

In *Taylor* this Court found that the general rule of *Tennessee Coal* did not apply, because "the oppression remedy in Section 241[was] purely a legislatively created statutory remedy,"[59] and "it was the intent of the [Canadian] Parliament that actions brought under Section 241 of the Canada Business Corporations Act be brought only in the courts of Canada identified in Section 2 of the Canadian Act."[60] That is, in *Taylor*, the right and the remedy were found to be so inseparably intertwined that equitable relief under the statute could only be obtained from one of the specific Canadian tribunals mandated in the statute. That is not the case here.

This case requires the application of the general rule of *Tennessee Coal* rather than the analysis applied in *Taylor*. Here, unlike *Taylor* (or, for that matter, unlike *Tennessee Coal*), the plaintiffs here are asserting claims arising under common law, not under an Argentine statute that purports to localize those claims exclusively within the Argentine court

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[57] *Id.* at 359.

[58] *Id.* at 360.

[59] *Taylor*, 715 A.2d at 840, n. 13.

[60] *Id.* at 841.

system. Moreover, here the plaintiffs' causes of action are not (as was found to be the case in *Taylor*) so inseparably intertwined with a statutorily-created remedy that the right can be enforced only in the statutorily-mandated tribunal.

This case is more akin to *Randall v. Arabian American Oil Co.*,[61] where the plaintiff brought a claim in the United States District Court for wrongful discharge from his employment with a Saudi Arabian oil company. Rejecting the argument that the Saudi Arabian Labor Law vested exclusive jurisdiction over such claims in the Saudi Arabian courts, the Fifth Circuit described the claim as "a classic example of a transitory cause of action that may be enforced in any foreign court having subject matter and *in personam* jurisdiction, and it held that:

> It stands to reason that if the Full Faith and Credit Clause of the United States Constitution, which is the Supreme Law of the land, does not compel one state from recognizing the exclusive jurisdiction provisions of a sister state, then we see little or no reason why in a transnational case, such as this, where no higher positive law binds us, we should be compelled to give effect to a foreign state's exclusive jurisdiction provision.[62]

For these reasons, we conclude that the claims being asserted here, although not sufficient to confer equitable jurisdiction, are by their nature transitory, and therefore are properly brought in the Superior Court of the State of Delaware.

Conclusion

For the foregoing reasons, the judgment of the Court of Chancery is affirmed in part, reversed in part, and remanded with instructions that the case be transferred to the Superior Court under 10 *Del. C.* § 1902.

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[61] 778 F.2d 1146 (5th Cir.1985).

[62] *Id.* at 1153.

APPENDIX B

COURT OF CHANCERY OF DELAWARE

No. Civ. A. 20135-NC

CANDLEWOOD TIMBER GROUP LLC and
Forestal Santa Barbara SRL,
Plaintiffs,

v.

PAN AMERICAN ENERGY LLC,
Defendant.

Submitted Sept. 29, 2003
Decided Oct. 22, 2003

MEMORANDUM OPINION

CHANDLER, J.

I. BACKGROUND

Plaintiff Candlewood Timber Group LLC ("Candlewood") is a Delaware limited liability company that formed an Argentine subsidiary, Forestal Santa Barbara SRL ("FSB"), which purchased approximately 250,000 acres of land in the Argentine Province of Salta. Candlewood and FSB are in the business of selling wood products derived from forests managed in an environmentally friendly manner. Candlewood and FSB allege that their business depends on the ability to obtain certification from an internationally recognized forestry organization that FSB's lands are managed sustainably. Defendant Pan American Energy L.L.C. ("Pan American") is a Delaware limited liability company that engages in oil and

gas extraction.[1] Pan American is the majority owner and operator of a consortium of companies that were granted concessionary rights by the Argentine Republic, the owner of all oil and gas rights in Argentina, to extract oil and gas in the Province of Salta, including lands owned by FSB.

Pan American has the right to extract oil and gas underneath FSB's land and sought permission from FSB to enter its land for this purpose. FSB, at Candlewood's direction, issued two permits for Pan American to enter FSB's land. These permits obligated Pan American to purchase comprehensive liability insurance, to hold harmless FSB from any claims by third parties, and indemnify FSB for any damage caused to "properties or any other assets (moveable or real estate) owned by FSB whether the damage is produced directly or indirectly by any employee or person or company contracted by Pan American, with obligation to repair or replace the asset damaged at the choice of FSB, immediately."[2]

Pan American initialed one of the permits and proceeded to enter FSB's land to perform oil and gas exploration and extraction. Candlewood and FSB allege that Pan American operations inflicted significant damage on the property. They also allege that this damage has prevented the plaintiffs from having their forest products certified as coming from sustainable sources.

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[1] Pan American operates in Argentina through a "branch," that is similar to a wholly-owned subsidiary.

[2] Second Am. Compl. ¶ 24. Plaintiffs also allege that there was accompanying correspondence and oral communications to the issuance of the permits in which plaintiffs explained to Pan American their sustainable forestry plans and the need to obtain third-party certification. It is also alleged that in these communications Pan American agreed to limit its impact to the land, conduct environmental impact assessments, and engage in certain environmental remediation activities. *See* Second Am. Compl. ¶¶ 21-27.

Plaintiffs allege five counts in their Second Amended Complaint: (1) Breach of Contract; (2) Negligence; (3) Fraud; (4) Tortious Infringement of Property Rights; and (5) Tortious Interference with Business Relations. The contract claim alleges that Pan American breached its obligations under the permits and accompanying correspondence and that "Candlewood and FSB are entitled to indemnification for their losses, and specific performance to compel Pan American to purchase comprehensive liability insurance, as Pan American committed to do."[3] The prayer for relief seeks an "order compelling Pan American to obtain and maintain in effect sufficient casualty, liability and fire insurance policies to protect FSB against any loss of value to the Candlewood Forest Property from casualty, including, without limitation, forest fire, and any liability and injury to employees, agents, contractors or other representatives of Plaintiffs, and to include Plaintiffs as named insureds of such policies."[4] This request for specific performance is the only reference in the complaint to an equitable remedy.

II. ANALYSIS

The plaintiffs' complaint is dismissed on two independent and alternative grounds. First, the complaint fails to invoke this Court's equity jurisdiction. Second, Delaware is not the proper forum for this dispute.

A. Equity Jurisdiction

By common-law tradition and statute, this Court does "not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State."[5] A legal remedy, *i.e.*,

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[3] Second Am. Compl. ¶ 45.

[4] Second Am. Compl. ¶ (A).

[5] 10 *Del. C.* § 342.

money damages, is "sufficient" if it is "complete, practical, and efficient."[6] As applied to this action, if money damages are a sufficient remedy to Pan American's alleged breach of contract, I will dismiss the complaint for lack of jurisdiction.[7]

"Equitable jurisdiction must be determined from the face of the complaint as of the time of filing, with all material factual allegations viewed as true."[8] But this Court will go behind the "facade of prayers" to determine the "true reason" for which Candlewood and FSB brought suit.[9] Then-Chancellor Allen described the applicable jurisdictional analysis as "a realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether legal remedy is available and fully adequate."[10]

I should note at the outset that the plaintiffs' complaint does not allege that there is an inadequate remedy at law. There is no allegation that a multiplicity of suits at common law will be required to cure the asserted wrong with finality.

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[6] *In re Wife, K.*, 297 A.2d 424 (Del. Ch.1972).

[7] None of the plaintiffs' five claims implicate matters over which this Court has jurisdiction pursuant to 10 *Del. C.* § 341, *e.g.*, a claim for breach of fiduciary duty. If jurisdiction exists, it only exists because there is no adequate remedy at law. The parties did not brief this issue directly, but "it is clear that, unlike many jurisdictions, judges in the Delaware Court of Chancery are obligated to decide whether a matter comes within the equitable jurisdiction of this Court regardless of whether the issue has been raised by the parties." *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 77 n. 5 (Del. Ch.1991). *See also Glanding v. Industrial Trust Co.*, 45 A.2d 553, 554 (Del.1945) (issue of equitable jurisdiction was raised on appeal "not by the parties but by the Court itself"); Del. Ch. Ct. R. 12(h)(3) ("whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the Court shall dismiss the matter").

[8] *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch.1991).

[9] *Id.*

[10] *McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch.1987).

There is no allegation that Pan American is insolvent or otherwise in such dire financial straits that execution on a money judgment would fail. It does not appear from the face of the complaint that a trier of fact would be unable to quantify the damages arising from the alleged breach of contract. And there is no allegation that the subject matter of the action is unique or of some special value to Candlewood and FSB that defies valuation. In short, the complaint sets out no basis at all for establishing equity jurisdiction other than "a kind of formulaic 'open sesame'"[11] by the use of the words "specific performance." Such an "incantation of magic words" is insufficient.[12]

Even if the plaintiffs had alleged that they had an inadequate remedy at law, a realistic assessment of whether money damages are sufficient to remedy the alleged breach of contract demonstrates that such an allegation would be a facade. The plaintiffs seek to require Pan American to purchase an insurance policy covering damage to their property, damage that has already been inflicted by Pan American's actions. Even if Pan American had such an insurance policy, it would presumably direct monetary payment to the plaintiffs if damage was done to the property-monetary payment that plaintiffs can recover as damages without resort to the extraordinary remedy of specific performance. In fact, the complaint itself demonstrates that there is an adequate remedy at law; the complaint seeks money damages for those harms that would have been covered by the insurance policy that Pan American allegedly

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[11] *IBM Corp.*, 602 A.2d at 78.

[12] *McMahon*, 532 A.2d at 603. In fact, looking at the complaint as a whole, it appears that the request for specific performance is a disingenuous jurisdictional hook and that plaintiffs truly seek money damages. But for my conclusion that Delaware is an inconvenient forum, this matter would be transferred to the Superior Court pursuant to 10 *Del. C.* § 1902.

never purchased. Because plaintiffs can adequately seek monetary damages in a court of law for Pan American's alleged breach of contract, this Court can not grant specific performance and, hence, does not have jurisdiction to hear and decide this matter.[13]

B. Forum Non Conveniens

A complaint is dismissed on *forum non conveniens* grounds when a defendant demonstrates that litigating in Delaware would impose on it an "overwhelming hardship."[14] In determining whether Pan American has demonstrated an overwhelming hardship, this Court considers the six *Cyro-Maid* factors.[15] The six factors are: (1) ease of access to proof; (2) availability of compulsory process for witnesses; (3) possibility of the view of the premises; (4) whether the controversy is dependent upon application of Delaware law; (5) the pendency of a similar action in another jurisdiction; and (6) other practical problems.[16]

Pan American "must show 'with particularity' that one or more of these factors, individually or together, imposes an 'overwhelming hardship.'"[17] The Supreme Court's reference

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[13] *See, e.g., Theis v. Board of Education*, 2000 Del. LEXIS 48 (Del. Ch.) (dismissing for lack of jurisdiction where adequate remedy at law existed for breach of contract claim); *Manchester v. Narragansett Capital, Inc.*, 1989 Del. LEXIS 141 (Del. Ch.) (finding specific performance an unnecessary remedy where money damages are adequate).

[14] *Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining, L.P.*, 777 A.2d 774 (Del.2001); *Warburg, Pincus Ventures, L.P. v. Dietrich K.H. Schrapper, M.D.*, 774 A.2d 264 (Del.2001).

[15] *Mar-Land*, 777 A.2d at 778.

[16] *Id.* (citing *Ison v. DuPont de Nemours*, 729 A.2d 832 (Del.1999); *General Foods Corp. v. Cyro-Maid, Inc.*, 474 A.2d 681 (Del.1964)).

[17] *Id.* (citing *Ison*, 729 A.2d at 838; *Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 36 (Del.1991). *See also Warburg*, 774 A.2d at 271 ("through the combination and weight of any or all of the . . . factors").

to "particularity" has established that "bare allegations of inconvenience without an adequate showing of particulars of the hardships" will not suffice.[18] Furthermore, the Supreme Court has held that "it does not matter whether only one of the *Cyro-Maid* factors *favors* defendant or all of them do"[19] because "whether an alternative forum would be more convenient for the litigation, or perhaps a better location, is irrelevant."[20] The issue is not whether Pan American has shown that Argentina is a better forum for the litigation, but whether Pan American has shown with particularity, through one or more of the *Cyro-Maid* factors, that litigating in Delaware constitutes an overwhelming hardship.

Access to Proof and Compulsory Process for Witnesses. The first two factors involve similar considerations and essentially seek to ascertain whether Pan American's ability to establish its defense is significantly impaired by litigating in Delaware. This analysis requires a consideration of what defenses Pan American proposes to rely on and an identification of "specific pieces of evidence [or witnesses] necessary to its defense that it will not be able to produce in Delaware."[21]

Although Pan American has not filed an answer in this case, it is clear that Pan American intends to contest that it damaged FSB's land to the extent alleged and that the witnesses, physical evidence, and documents related to this defense are located in a remote area of Argentina. Travel to and from this location for litigation in Delaware is extremely inconvenient. The travel time is of a magnitude considerably greater than that found not to work an overwhelming hardship in *Warburg*.[22] Moreover, the five employees most knowl-

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[18] *Id.* at 780.

[19] *Chrysler First*, 669 A.2d at 108 (emphasis added).

[20] *Mar-Land*, 777 A.2d at 779.

[21] *Id.* at 781.

[22] *Warburg* involved travel to and from major metropolitan areas in

edgeable of Pan American's activities in Argentina live, unsurprisingly, in Argentina and speak minimal English.[23] These employees are also critical to normal business operations and Pan American's business will suffer significant disruption if they must travel to Delaware for trial. Furthermore, all of the documents relating to this case are in active use in Argentina and virtually all of the documents are in Spanish. Securing live testimony of these witnesses and producing English translations of the relevant documents in Delaware will entail substantial burdens to Pan American. Practically, in order to litigate in Delaware, Pan American may suffer the deprivation of live testimony and, resultantly, may have difficulty presenting rebuttal testimony.

Additionally, this Court may have limited powers to compel access to witnesses and documents, at least at a pre-trial stage. Argentina is a signatory of the Hague Convention on Taking of Evidence Abroad in Civil and Commercial Matters.[24] The Supreme Court has recognized that use of the Hague Convention's procedures for securing evidence is cumbersome.[25] Under the Convention's procedures, this Court may issue a "Letter of Request" directed at the Argentine Ministry of Foreign Relations and Culture to obtain evidence. The Ministry of Foreign Relations and Culture then transmits the letter to a judicial authority competent to execute the request. Notably, however, Argentina included as a reservation to its accession to the Convention the following language: "The Argentine Republic will not execute Letters

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Germany and England, 774 A.2d at 270.

[23] The facts regarding the location and access to witnesses and evidence were established through the affidavit of Fernando Villarreal, Gas Operations Vice President at Pan American.

[24] *Opened for signature* March 18, 1970, 23 U.S.T. 2555, 28 U.S.C. § 1781.

[25] *Ison*, 729 A.2d at 843.

of Request issued for the purpose of obtaining pre-trial discovery of documents as known in the common law countries."[26] As a result of Argentina's reservation to the Hague Convention, Pan American may have no pre-trial discovery.

View of the Premises. As noted, the essential damages issue in this case is whether Pan American caused harm to FSB's land. Plaintiffs' central allegation is that "Pan American has engaged in mammoth excavation activities on FSB's property that have inflicted and continue to inflict widespread, unremediated damage."[27] The case will undoubtedly contain dueling expert opinions on the scope of the alleged damage. Pan American asserts that this factual dispute cannot come to resolution without a view of the premises and, therefore, it will suffer overwhelming hardship if forced to litigate here. Delaware cases that have considered this factor have concluded that, to the extent that a view of the premises is necessary, video is a reasonable substitute.[28]

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[26] *See* Hague Conference on Private International Law, *Full Status Report Convention # 20* (Aug. 21, 2003), at *http://www.hcch . net/e/ status/stat20e.html.*

[27] Second Am. Compl. ¶ 4. The plaintiffs allege that this damage has resulted in "degradation of the environment and biodiversity" of FSB's land through "fragmentation of habitats," "creation of access corridors that facilitated the illegal intrusion of hunters and cattle," and "invasion of exotic . . . species." *Id.* at ¶ 37.

[28] *See Ison v. E.I. Dupont De Nemours & Co.*, 729 A.2d 832, 837 (Del.1999); *Texas Instruments v. Cyrix Corp.*, 1994 Del. LEXIS 31, 18-19 (Del. Ch.); *Sequa Corp. v. Aetna Casualty & Surety Co.*, 1990 Del. LEXIS 303 (Del.Super.). *But see McDonald's Corp. v. Bukele*, 960 F.Supp. 1311, 1319 (U.S.Dist.1997) ("a view of the premises may be necessary"); *Miller v. Phillips Petroleum Co.*, 529 A.2d 263, 270 (Del. Super.1987) ("[t]o the extent it is necessary . . . it is more easily done by the [foreign court]"); *Moffitt v. Illinois Power Co.*, 248 Ill.App.3d 752, 761 (Ill.App.1993) ("if a view of the premises were necessary it would be more convenient" to travel from the foreign court).

None of these cases, however, involved complex factual disputes related to injury done to real property; the need to view the premises, in my opinion, is greater in the instant case. Video is a substitute, but it is only that-a substitute. Pan American will clearly suffer difficulties if forced to litigate in Delaware because the finder of fact cannot view the premises.[29]

Delaware's Interest in the Litigation. Delaware's interest in a dispute regarding injury to land located in Argentina is minimal, especially since the conduct alleged to have caused that injury occurred in Argentina. A preliminary analysis of the relevant choice of law principles indicates that Argentine law will almost certainly govern this dispute.[30] Although

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[29] In *Woodlands Cemetery Co. v. United States*, 110 F.Supp. 704, 706 (E.D.Pa.1953), the court found that in a takings case "the jury were in a much better position to properly evaluate the property after having seen it with its own surroundings" and "in view of the great disparity in the testimony of the two sets of experts as to the value of the land, that the jury would have been in no position to properly evaluate the estimates of the experts without personally viewing the land, its location and surroundings. . . ."

[30] Delaware has adopted the Restatement approach to resolving choice of law issues. *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160 (Del.1978). The Restatement establishes the broad principle that rights and liabilities with respect to the particular issue are determined by the local law of the State that, as to that issue, has "the most significant relationship" to the occurrence and the parties. In this case, Argentina has the most significant relationship to the dispute and the parties: the land is located in Argentina, the relevant conduct occurred in Argentina, and two parties are Argentine companies. *See* Restatement (Second) of Conflict of Laws § 147. Plaintiffs' contract claim is also governed by Argentine law. The place of contracting, negotiation, and performance was Argentina. The subject matter of the contract is located in Argentina. And again two parties are Argentine companies. *See* Restatement (Second) of Conflict of Laws § 188. The preceding concerns are amplified in this case since the contract concerns interests in land located in Argentina. *See* Restatement (Second) of Conflict of Laws § 189.

Delaware courts "wrestle" with open questions of the law of foreign countries on occasion,[31] this case presents a unique combination of circumstances that warrants a careful and thorough examination of this factor.

The heart of this case involves a land use dispute arising under the laws of Argentina. Delaware has a very limited interest in this litigation, but Argentina's interest in this litigation is substantial. In fact, Pan American has argued that Argentine courts have exclusive jurisdiction to resolve the issues in this case because the resolution of this litigation will implicate Argentina's interests in the oil and gas that Pan American was seeking to extract from FSB's land.[32] Pan American filed a petition on March 5, 2003, in the Supreme Court of Argentina, seeking a declaration that this dispute is subject to the exclusive jurisdiction of Argentine courts. The Argentine Attorney General issued an opinion concerning Pan American's petition, in which the Attorney General opined that Argentine courts should have exclusive jurisdiction over any dispute concerning Pan American's operations on FSB's land under the concessionary rights provided by Argentina to Pan American.[33] Based on the Attorney General's opinion, the Supreme Court of Argentina ordered service on all defendants, including the Nation of Argentina and the Province of Salta. On July 11, 2003, the Province of Salta entered an appearance in the Argentine

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[31] *See Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1120 (Del.1997).

[32] As noted above, all oil and gas in Argentina is owned by the national government and the right to extract oil and gas is granted to private parties like Pan American. The right to extract the oil and gas is accompanied by an easement to access any land under which the oil and gas is located. The Nation of Argentina and the Province of Salta derive significant revenues from Pan American's extraction of oil and gas reserves. Aff. of Francisco J. Romano, Ex. 2 (op. of Argentine Att'y Gen.); Aff. of Haracio A. Grigera Naon, ¶¶ 47-53; Aff. of Edmundo F. Catalano, ¶¶ 3-5.

[33] Aff. of Francisco J. Romano, Ex. 2.

Supreme Court and asserted that the Argentine courts are the proper forum for this dispute. On September 12, 2003, the Nation of Argentina also entered its appearance, stated that it had a direct interest in the outcome of the dispute, and reiterated the Province of Salta's assertion that the Argentine courts are the only appropriate forum.

Argentina, as owner of all oil and gas resources in Argentina, has a bona fide interest in any compensation paid to FSB due to damage allegedly caused by Pan American's operations pursuant to extraction rights granted to it by Argentina. This interest is not speculative, and is evidenced by the Nation of Argentina and Province of Salta's submissions before the Supreme Court of Argentina. A decision in this action will likely implicate Argentina's right to regulate access to surface property that lies above government owned oil and gas fields. Furthermore, a decision will implicate Argentina's economic interests because a decision adverse to Pan American may reduce the revenues Argentina derives from Pan American's extraction activities. Because of the significant interests of Argentine governmental entities, the Argentine courts may have *exclusive* jurisdiction over this dispute.[34] This exclusive jurisdiction may independently deprive this Court of its jurisdiction.[35] Regardless, Argentina's significant interest in this litigation, and Delaware's limited interest in this litigation, counsels judicial discretion strongly in favor of dismissal.[36]

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[34] Although the resolution of this issue is pending before the Argentine Supreme Court, it appears that under Articles 116 and 117 of the Argentine Constitution a dispute where the Nation of Argentina and a province thereof are interested parties requires resolution in an Argentine court, not a foreign country.

[35] *See Taylor v. LSI Logic Corp.*, 715 A.2d 837 (Del.1998) (dismissing complaint where foreign country recognized exclusive jurisdiction over subject of dispute).

[36] *See IM2 Merchandising & Mfg., Inc. v. Tirex Corp.*, 2000 Del.

Other Pending Litigation. As discussed, there is an action similar to this litigation pending before the Argentine courts. Both parties' legal experts have testified that the Argentine courts are fully capable of resolving disputes of this nature. And the Argentine courts may actually have greater capacity to resolve this dispute since they can exercise jurisdiction over the governmental entities, the Nation of Argentina and the Province of Salta, with an interest in the outcome of this dispute.[37]

Another Practical Problem. Before Pan American began extensive oil and gas extraction, Pan American conducted preliminary seismic surveying on FSB's land. This preliminary activity apparently caused some damage to FSB's land. Pan American paid FSB for damage caused by the seismic surveying, and in June 2000, George Brooking, attorney-in-fact for FSB, signed a Receipt for Indemnification Payment that included an exclusive Argentine forum selection clause.[38] Pan American argues that the forum selection

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LEXIS 156, *37 (Del. Ch.) ("The great weight given to a plaintiffs interest in having novel Delaware law questions, decided in our own courts under the *Cyro-Maid* test suggests that a defendant's interest in having the courts of the jurisdiction of the governing law decide important legal issues ought also be given some weight") (footnotes omitted). In addition, it is notable that although the complaint sounds in simple breach of contract and negligence language, it is clear that resolution of this dispute will require thorough consideration of Argentine hydrocarbon law and policy, as well as a careful policing of the boundaries between Argentine tort, contract, and real property law. "Modesty and consistency in approach suggest that the evaluation of these issues may best be accomplished by the courts in the jurisdiction of the governing law." *Id.* at *39.

[37] This Court is limited in its exercise over foreign governments by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a), 1391(f), and 1601-1611.

[38] FSB signed a similar Receipt, which also contained an exclusive Argentine forum selection clause, in August of 2000.

clauses contained in the Receipts strip this Court of subject-matter jurisdiction.[39]

Pan American, however, must establish that the claims alleged in the complaint are governed by the forum selection clauses contained in the Receipts. The Receipts were signed as acknowledgement of monies paid by Pan American to FSB for damage related to the conduct of seismic surveying. The Receipts do not purport to cover Pan American's more intensive activities of establishing an oil well and constructing a road to that oil well. Plaintiffs argue that those activities are governed by different contracts that do no contain a forum selection clause and that the claims in the Second Amended Complaint only relate to damage from the drilling and road constructing covered by those contracts.[40]

Pan American argues, however, that it would be impossible in some circumstances to determine what damage was caused by clearing land to conduct seismic activities, which would be governed by the forum selection clauses, as opposed to damage caused by building an oil well and connecting road. In *In re IBP, Inc. S'holders Litig.*, the Court of Chancery assumed jurisdiction over a dispute that was partially governed by a forum selection clause (specifying the Delaware Court of Chancery) because otherwise no single jurisdiction could hear all of the relevant claims.[41] Similarly, Pan American argues that this Court should decline jurisdiction because only the courts of Argentina can hear claims for damages arising out of *both* the seismic surveying and oil drilling/road clearing activities. Although I decline to dismiss this action solely because of the forum selection clauses in the

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[39] This Court may dismiss an action where the parties have consented to have their dispute resolved in another forum. *Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286 (Del.1999).

[40] *See supra* n. 2 and accompanying text.

[41] 2001 WL 406292 (Del. Ch.).

Receipts, I note that it will be necessary to delineate clearly the line between the damage caused by the seismic activities and the damage caused by oil and gas extraction during the course of this litigation-a complicated task that could prove unmanageable. Argentine courts would not face this same definitional problem and could bear all issues surrounding Pan American's activities.[42]

Taking all of these various factors into consideration and giving each the weight it deserves, I conclude that litigating this dispute in Delaware would constitute an overwhelming hardship to Pan American. Delaware has little or no interest in resolving this dispute. Plaintiffs purchased real estate in Argentina. They formed an Argentine entity to develop the resources located in Argentina. They negotiated and executed contracts in Argentina. The breach of these contracts, and the alleged tortious conduct attendant thereto, all occurred in Argentina. Argentine law will govern this dispute. Finally, Argentine governmental authorities have expressed a direct interest in this controversy. Litigating this matter in Delaware, rather than in Argentina, defies common sense.

III. CONCLUSION

For the foregoing reasons, the plaintiffs' claims are dismissed based on a lack of subject matter jurisdiction. Alternatively, plaintiffs' claims are dismissed based on *forum non conveniens.*

IT IS SO ORDERED.

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[42] Independently, FSB's agreement to an exclusive Argentine forum selection clause evidences a willingness to adjudicate some disputes relating to Pan American's activities in Argentina. This further supports, in my opinion, the appropriateness of Argentine courts as the forum for this dispute. It also undercuts plaintiffs' repeated efforts to disparage the Argentine court system.

APPENDIX C

TRADUCCIÓN PÚBLICA/CERTIFIED TRANSLATION ....

[Terms between square brackets are translator's notes] .....

[Pages are numbered, in handwriting, from 525 to 539. On the reverse side of all pages there appear: a seal which reads: "COPY"; a seal of the Federal Supreme Court and an illegible signature and a seal which reads: "Alicia M. Carbajales de Fassina—Deputy Clerk—Federal Supreme Court"] .....

TREASURY DEPARTMENT GENERAL ATTORNEY'S OFFICE .....

THE FEDERAL GOVERNMENT ANSWERS SUMMONS TO APPEAR AS THIRD PARTY .....

To the Honorable Supreme Court: .....

Silvia Mabel PALACIOS, attorney-at-law (CPACF, Volume 65, Folio 492), for and on behalf of the Federal Government—Ministry of Economy, as evidenced herein below, María Cecilia PINTOS PRAT, attorney-at-law (CPACF, Volume 11, Folio 786) and María Ida A. RICARDONE, attorney-at-law (CPACF, Volume 19, Folio 247), represented by attorney-of-record Dr. Horacio Daniel ROSATTI, General Attorney for the Argentine Federal Treasury Department, appointed by Decree No. 255/03 (Official Gazette 06-25-03), who intervenes pursuant to the provisions of Act No. 12,954 § 6, Act No. 25,344 § 6 and Decree No. 1116/00 § 15, establishing domicile *ad litem* in the City of Buenos Aires, at 186 Balcarce, 3rd floor, in re "*Pan American Energy LLC, Argentine Branch v. Forestal Santa Barbara S.R.L. et al—the Province of Salta and the Federal Government having been summoned to appear as third parties) in the matter of Declaratory Action*"—File No. P.204.2003—Record Xxxxix—, hereby appear before Your Honor and respectfully state as follows: .....

—I—

LEGAL CAPACITY

As evidenced by the enclosed certified copy of Resolution S.L. y A. No. 9 of the Ministry of Economy dated January 13, 2003—which we hereby declare under oath to be a true copy of the original Resolution in full force and effect—we are attorneys-in-fact of the Federal Government with power to intervene in any and all actions to which the said Ministry is a party, wherefore we request Your Honor to enter record of our appearance in such capacity. .....

—II—

PURPOSE

We hereby answer the summons to appear as third party petitioned by the plaintiff, Pan American Energy LLC (hereinafter, "PAE"), issued by the court under the provisions of the Federal Civil and Commercial Code of Procedures § 94, and notified under official letter dated May 29, 2003. ....

It is expressly represented that this answer will be limited to stating the position of the Federal Government as to the jurisdiction of the Supreme Court over matters related to the concession, wherefore we will not answer as to any matter outside the purpose of the declaratory action to determine jurisdiction, or any document making reference to such other matters, as they are alien to the purposes for which the Federal Government has been summoned. Accordingly, nothing in this answer should be construed as an acknowledgment or rebuttal of any statement made in the complaint in relation to any such matters. .....

In this context, and subject to the foregoing provisos, the Federal Government intervenes on an autonomous basis and requests Your Honor to rule that matters related to the hydrocarbon concession granted by the Federal Government under Contract No. 20,510 (as amended), of which Pan American Energy LLC is a co-holder, are governed by special Argen-

tine laws and that any dispute arising out of or in connection therewith shall be submitted to the jurisdiction of the Argentine federal courts. .....

—III—

BACKGROUND RELEVANT TO THIS CASE

1. *History* .....

The hydrocarbon fields located in the area known as "Acambuco", in the Province of Salta, were discovered in the 1920s. .....

The fields have been mined for several decades, initially and during many years by Standard Oil of New Jersey (now "Exxon") and subsequently by Yacimientos Petroliferos Fiscales (YPF) . .....

In 1979, YPF and Bridas S.A.P.I. y C., Socma S.A. and Inalruco S.A.P. entered into Contract No. 20,510, as approved by Decree No. 3,121/79, under which YPF granted a concession for hydrocarbon exploration, development and production in Acambuco area. .....

The concession lasted several years, with some changes in the membership of the concession holder (Decree No. 2,878/83). .....

2. *The significance and standing of the fields and the concession.*

It is relevant to point out to this Court that the Acambuco area is one of the major hydrocarbon—specially gas—producing areas, in the Argentine Northwestern Basin. .....

The gas supply necessary to meet the requirements of the people and industries established in the region depend upon the production of said area. .....

3. *The participation of Pan American Energy LLC*.....

As a direct consequence of the enactment of Act 23,696 (sections 9, 10, 11 and 15) Decree No. 2,175/91 (Official Gazette 10-25-91) was issued, which approved the memorandum of agreement entered into between YPF and a group of companies making up the Acambuco Joint Venture. Said memorandum of agreement approved conversion of Contract No. 20,510 for hydrocarbon production in the Acambuco area. .....

Subsequently, Pan American Energy LLC joined this business group, upon prior approval by the enforcement authority under Administrative Resolution of the Head Minister No. 18/00 (Official Gazette 11-2-2000). .....

4. *The surface Owner (Forestal Santa Bárbara: its going on stage and filing of action in foreign jurisdiction).* .....

In 1998, Forestal Santa Bárbara S.R.L. (hereinafter "FSB"), purchased the surface lands, in Acambuco Area, in which the hydrocarbon fields are located. .....

As already noted and as may be easily inferred, the property at issue had been for several decades, and was, at the time it was purchased, subject to mining easements held by the various mining companies referred to above. .....

In January 2003, FSB filed an action with the Delaware (United States) courts against Pan American Energy LLC and BP Argentina Exploration Company, as described in the complaint, seeking relief under the rules and principles of Equity in the amount of US$50,000,000. They have further petitioned that permanent injunctions be issued ordering PAE to repair and reinstate the soil, to withdraw toxic, unproductive or waste material, to restrain from unloading toxic or flammable material, and to deliver to FSB, prior to commencing construction work, all elements necessary to establish a detailed supervision and application program that will

allow plaintiffs to ensure and enforce compliance with the terms thereof. .....

—IV—

THE CLAIM, THE FACTS AND THE INTERVENTION OF THE FEDERAL GOVERNMENT

1. *The Claim* .....

PAE has filed a declaratory action (Federal Civil and Commercial Code of Procedures § 322) seeking the Court to declare that: a) based on the fact that the interests of the Province of Salta and the Federal Government, as well as constitutional guarantees, are at stake, the dispute between PAE and the defendants in connection with the concession—which is the subject matter of the action filed by the defendants in USA—falls within the original jurisdiction of the Court; b) subsidiarily, that Argentine Federal Courts have sole and exclusive jurisdiction over that matter or c) again subsidiarily, that Argentine ordinary judges have jurisdiction over that matter, according to the internal rules for determination of jurisdiction. .....

2. *Position of the Federal Government with respect to the facts and the claim.* .....

Subject to the provisos in Chapter II hereof and beyond any considerations on the plaintiff's uncertainty regarding the action pending in the State of Delaware, USA, this party is convinced that the extent and modalities of the legal relationship arising from the hydrocarbon concession is governed by Act 17,319, the Mining Code, and other special regulations enacted to that effect, and that, consequently, any dispute arising out of or in connection with such matters should be settled by the Argentine federal courts. .....

This party does not admit that the risk of losing gas supply agreements or the potential loss or damage claimed by the

plaintiff in its brief and translated into damages constitute grounds for suspending the Macueta Sur drilling operations....

In this regard, PAE claims that the "*mere existence of the Delaware action affects the drilling program*" which the company expected to implement in the Macueta Sur area, and has led PAE to "*suspend the works it is required to perform under a concession granted by the Argentine government*" because "*the mere service of the Complaint fled in Delaware have produced the effects desired by the complainants: namely, to force the concession holder to suspend the works it is required to perform under the concession contract*".....

PAE further claims that the foreign court's potential ruling ordering the suspension of gas supply involves the risk of losing its gas supply agreements with third parties. .....

It should be noted that in connection with the foregoing, the Argentine Hydrocarbon Act No. 17,319 § 66 provides, in its pertinent part, that "*Under no circumstance shall the surface owner's objection to occupation of its lands or disagreement with the compensation amounts determined be sufficient grounds to interrupt or prevent authorized works, provided the concession holder satisfactorily guarantees payment for potential damage*". .....

This legal provision entitles PAE to continue with the hydrocarbon works and projects at issue.....

Therefore, this party cannot admit the loss or damage claimed by the concession holder, much less if claimed as grounds for non-performance of its legal obligations under the concession contract, in particular the provisions of section 31 of the Hydrocarbon Act[1]. .....

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[1] Section 31, Act 17,319. Each production concession holder is *under an obligation to make, within reasonable terms, such investments as are necessary to carry out the works required to develop the entire concession area*, in accordance with the most rational and efficient practices and the

Finally, and pursuant to the requirement of the Code of Procedures § 356, ss 1, we do not acknowledge, because it is not known to our party, the documentary evidence submitted by the plaintiff and identified as Exhibits 005 to and including 022. .....

3. *Capacity in which the Federal Government was summoned and its role in the process.* .....

The Federal Government was summoned as third party to intervene in these proceedings pursuant to the provisions of Section 94 of the Code of Procedures. Such summons were petitioned on the grounds that certain Federal Government's powers are at stake in this suit, namely: the Executive's police power over Argentine public utilities, the Executive's power under the Hydrocarbon Act to determine the compensation payable to surface owners, and the concession holder's right to abide by the provisions of the concession contract. .....

In other words, because it is understood that this is a *common dispute*, and the Court's decision may affect the Federal Government. .....

Therefore, according to procedural laws and regulations, this is a "*mandatory or compulsory*"[2] intervention, in which, upon appearing in the process, *the third party may play the role of a passive observer or assume other roles such as co-plaintiff or co-defendant, or third party defendant or plaintiff, or propose complaints or counterclaims, and, in turn, the*

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characteristics and quantity of proved reserves, *ensuring the largest hydro-carbon production* that is consistent with appropriate and economic field management and adherence to guidelines for an appropriate preservation of reserves. .....

[2] See Palacio Lino Enrique, "*Manual de Derecho Procesal Civil*", Volume I, Buenos Aires, 1987, pages 334 et seq.....

parties to the process may propose complaints, motions or counterclaims against such third party[3] .....

Thus, the possibility of the Federal Government intervening in the capacity of a third party plaintiff (also known as *adhesive simple intervention*) is excluded because this would only apply if it were to intervene to *support the plaintiff's claims*[4]. .....

On the basis of the foregoing premises, the Federal Government is assumed to be a co-plaintiff to this dispute (*adhesive autonomous intervention or joinder*) for, while in certain respects it supports PAE's rights, this brief asserts the effectiveness and application of specific federal laws and regulations to all aspects of the concession, in particular the police power, but does not admit the damage claimed by PAE and its alleged inability to perform the obligations legally assumed under the concession contract. .....

Any permanent injunction might affect and even limit the powers vested in the Federal Government[5]. This circumstance would allow us to assume the existence of a *common dispute*. .....

The foregoing determines the convenience of the Federal Government intervening in the process not as a third-party plaintiff but autonomously and separately from PAE, to defend the Argentine jurisdiction and the power and authority of the Federal Government in any and all matters related to hydrocarbon production concessions granted by it. .....

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[3] See Giangrasso, Antonio José, "*Código Procesal Civil y Comercial de la Nación Anotado*", Ed. Depalma, Buenos Aries 1989, page 115. .....

[4] See Carnelutti, Francisco, "*Sistema de Derecho Procesal Civil*" Volume II, Ed. Hipanoamericana, page 46 et seq.; Palacio, ob. cit., page 333. .....

[5] Pursuant to Act 17,319 § 32, § 36 and related sections. .....

4. *The Federal Government's interest in this matter*.....

In light of the foregoing, the Federal Government has an interest in the ruling to be issued, to the extent the declaratory action seeks to prevent a foreign court ruling from jeopardizing principles that are of the essence of Argentine government's Sovereignty. The foreign ruling may, among other things, impair or otherwise affect the exclusive powers and jurisdiction of the Argentine Federal Government and the application of Argentine Law in hydrocarbon matters, thus improperly interfering with matters of public interest. .....

Finally, it is worth noting that the Court has held, in connection with matters of public interest, that in the case of oil fields, the judicial interpretation criterion should be based on the criterion applied for federal and general legislation on the matter, which takes into account the serious and far-reaching economic and political problems associated with and originated by oil, a hydrocarbon that has revolutionized engineering and, consequently, changed many aspects of the Argentine and international situation. It is only reasonable that the legislator shall have issued a set of rules that reserve to the Federal Government the ownership of hydrocarbon fields, since the property system to which they are subject is directly and mainly aimed at safeguarding major public values and achieving common welfare for the Nation as a whole. .....

The Court has further pointed out that development and operation of hydrocarbon fields are specifically aimed at achieving goals of unquestionable federal significance which involve the interests of all provinces and affect the Argentine community as a whole.[6] .....

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[6] Federal Supreme Court *Province of Mendoza v. Federal Government*, 8-2-1988. Ruling 311:1265 and its quotations of Rulings 301:341; 305:1381 and 306:1883. .....

—V—

THE RIGHT TO JURISDICTION AS A PREMISE TO DECIDE THE CASE

It is our opinion that the Argentine courts' right to jurisdiction has its foundations in basic principles. .....

Each Nation, through its constitutional power, sets the scope and extension of its sovereignty and, where its constitutional system provides for the delegation of basic duties or the integration into a communitary or extraterritorial system, then it is essential that its constitution contain permissive provisions; otherwise, the constituent would find no limit in the constitutional power, which is inconsistent with the rigid or semi-rigid constitutional system. .....

Based on this premise, the Federal Constitution is the necessary parameter for analyzing both the preeminence of supranational treaties or regulations over infra-constitutional laws, and the governing principle to determine the compatibility of legal provisions incorporated into national law. .....

It is for the Federal Supreme Court to compare, in its capacity as ultimate interpreter of the Federal Constitution, the legal provision that is to be incorporated into national law and which derives from a treaty, with the public law principles established in the Federal Constitution, which will prevail (Federal Constitution § 26 and § 117). .....

Can a supra-legal Treaty contravene the Federal Constitution? Can this conflict be resolved by the Federal Supreme Court? .....

The answer in both cases is affirmative, for if this conflict exists, the relevant dispute may be submitted for resolution by the Federal Supreme Court (if its scope falls within the provisions of section 116 of the Federal Constitution), which will ultimately determine the constitutionality of the disputed rule or provision. Its decision will be binding on the parties

and have such territorial scope as shall result from the general principle of territorial sovereignty. .....

It is obvious then that the governing principle is safeguarding local jurisdiction.

Any analysis will start from the premise that no principle of constitutional public law should be suppressed or impaired.

The exercise of jurisdiction by a Government agency by virtue of constitutionally vested powers is a clear expression of the exercise of national sovereignty. .....

The Supreme Court has held in previous cases that any limitation or impairment of such principle by any conventional provision that, in the Court's judgement, affects any of the attributes of sovereignty and limits the justiciability of the Nation's acts by its own courts, shall be held contrary to the Federal Constitution (Rulings 254:500, in re: "*La República Cia. Argentina de Seguros Generales S.A. v. Banco de la Nación Argentina*"). .....

—VI—

LEGAL FRAMEWORK OF HYDROCARBON FIELDS DEVELOPMENT AND OPERATION

1. The Argentine hydrocarbon legal framework is mainly embodied by Act 17,139 and other regulatory and supplemental regulations issued by the Federal Executive and its specific agencies. .....

Said legal framework governs, among other things, the granting of permits for hydrocarbon exploration, and production and transportation concessions; the rights and duties of permit holders and concession holders; and the monitoring, supervisory and regulatory powers of the relevant federal enforcement agencies. .....

2. *The Federal Executive establishes the hydrocarbon policy.* .....

Act 17,319 §3 provides that the Federal Executive will establish the federal policy for the above mentioned activities, having as its primary purpose the satisfaction of Argentina's hydrocarbon needs with the production of its fields, by maintaining such reserves as are necessary to fulfill this purpose. .....

This administrative power has not been changed by Title I of Act 24,125, which has transferred the public ownership of hydrocarbon fields from the Federal Government to the provinces in which the fields are located, upon occurrence of the events referred to in Section 1, subsections a), b) and c) and Section 22 of Act 24,125. .....

3. *The Federal Secretariat of Energy is responsible for enforcing Act 17,319.* .....

The Federal Secretariat of Energy is the specific agency, within the Federal Executive, responsible for enforcing Act 17,319 and related regulatory and supplemental legal provisions, as provided in its Section 97, except for matters under the exclusive jurisdiction of the Federal Executive, as exhaustively listed in its Section 98. .....

4. *Hydrocarbon fields are federal public utilities.* .....

Pursuant to Section 75, subsection 30) of the Federal Constitution, hydrocarbon fields located in Argentina are federal public utilities, therefore, the Federal Congress has exclusive powers to issue the legal provisions necessary to ensure that the specific purposes of such utilities are fulfilled. .....

In the exercise of said powers, and of those vested by Section 75, subsection 12) of the Federal Constitution, the Federal Congress passed the Mining Code (restated by Decree 456/97) and Act 17,319, which specifically governs

hydrocarbons and vests enforcement and supervisory powers in the Federal Executive and its specific agencies. .....

5. *Hydrocarbon fields constitute mining easements.* .....

When the Federal Executive grants a hydrocarbon exploration permit, or a hydrocarbon production or transportation concession, the surface lands become subject to easements (Act 17,319 §66 and Mining Code §146). .....

Mining easements are, in essence, administrative or legal easements in that they are granted by the appropriate government agencies (in the case of hydrocarbons, the Secretariat of Energy) pursuant to applicable laws, without the agreement or consent of the surface owner being necessary. .....

6. *Rights of hydrocarbon concession holders*.....

Act 17,319 provides that concession holders have an exclusive right for at least 25 years to extract hydrocarbons underlying the surface area covered by the concession instrument. (Sections 25 and 35). .....

To this end, the concession holder is authorized to perform works such as hydrocarbon exploration and drilling, construction and operation of treatment and refining plants, communication and transportation systems, buildings, warehouses, camps and, generally, such other works and operations as are necessary to carry out its activities (Act 17,319 §30). .....

7. *Rights under mining easements* .....

In connection with the actual execution of the necessary works and installations, the concession holder further has the right to be granted mining easements on (or request mandatory sale of) the privately-owned lands in which the production area is located, and, if applicable, its neighboring premises, as set forth in Section 146, Section 156 et seq. of the Mining Code and Section 66 of Act 17,319. .....

Said easements, the creation of which falls under the jurisdiction of the Enforcement Authority under Act 17,319, may be granted even before the compensation payment is made by the Concession Holder to the surface owner, upon the occurrence of any of the events listed in Section 153 of the Mining Code, including, without limitation: (a) if the works are urgent or are the continuation of other works whose interruption will cause adverse effects, (b) if more than 15 (fifteen) days have elapsed from concession holder's notice or surface owner's claim, or (c) if the compensation amount cannot be easily determined. .....

Under no circumstance shall the surface owner's objection to occupation of its lands or disagreement with the compensation amounts determined by the Federal Executive in accordance with Section 98, subsection h, and Section 100 of Act 17,319 be sufficient grounds to interrupt or prevent authorized works, provided the concession holder satisfactorily guarantees compensation for potential damages (Section 66, third paragraph, Act 17,319). .....

8. *Concession Holders' obligations*. .....

In contrast with the above mentioned rights, the concession holder has substantially the following duties: a) to make such investments as are necessary for the development of the entire concession area, ensuring the largest hydrocarbon production that is consistent with appropriate and economic field management (Section 31); b) to pay on an annual basis to the Federal Government a "concession fee" for each square kilometer within the concession area; and to pay on a monthly basis to the Province of Salta "royalties" on the proceeds of liquid and gaseous hydrocarbons extracted (Sections 12 and 58); c) to compensate surface owners for any damage sustained by their property (Section 100); and d) to take such steps as are necessary to prevent or mitigate damage to agricultural activities (Section 67) by conducting exploration, production and transportation operations in accordance with

the environmental protection regulations set forth in Resolution No. 105/92 of the Secretariat of Energy and other regulations issued thereunder. .....

9. *The concession holder's special obligation to compensate surface land owners.* .....

As noted above, the concession holder is under an obligation to compensate surface owners for any damage caused to their lands by concession holder's works. .....

Matters related to compensations payable by permit holders and concession holders for damages caused to surface lands are specifically regulated by Section 98, subsection h, and Section 100 of Act 17.319[7]; sections 1, 2, 3 and related sections of Decree No. 6,803, as amended by Decree No. 287/88, as well as the provisions of Resolution No. 1/02 of the "*Comisión Asesora de Indemnizaciones Decreto No. 6803/68*" (Advisory Committee for Compensations under Decree No. 6,803/68)[8]. .....

To that end, and in the exercise of the powers vested by the above mentioned regulations, the Federal Executive has established compensation amounts by zone through Decrees No. 860/96 and 861/96 (recently adjusted by application of the procedure set forth in Section 2 of Decree No. 6,803/68 and supplemental regulations). .....

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[7] Section 98.—The Executive shall have exclusive jurisdiction over the following matters: . . . h) *To set the amount of compensations recognized to surface owners.* .....

Section 100.—*Permit holders and concession holders shall compensate surface owners for any damage caused to their property by such holders' activities.* The interested parties may file an action for judicial determination of the compensation amount, or accept—by mutual agreement, at their sole discretion and on an exclusive basis—the determination made by the Executive for the relevant zone, without the surface owners being required to furnish any evidence. .....

[8] Official Gazette 10-17-2002 .....

While the foregoing regulations are not specifically applicable to the Province of Salta, Decree No. 861/96 §40 provides that for zones that do not fall within a specific regulation, the parties may mutually agree on temporarily adopting the compensation amounts established by said Decree for Zone "A". .....

In addition, for zones not covered under any administrative regulation, both parties may jointly apply to the Secretariat of Energy for determination of the relevant compensations amounts. Such determination shall have the same effects as the acceptance referred to in Section 100 of Act 17,319 (Decree No. 6,803/68 §3). .....

If the parties fail to mutually agree on the compensation amounts, the provisions of Section 100 shall apply. .....

In light of the action filed by FSB in the US Suit it is not superfluous to note that the judicial determination provided for by section 100 refers solely and exclusively to determination by Argentine courts. .....

Therefore, in accordance with the Argentine legal system, unless a valid private agreement shall have been reached between the concession holder and the surface owner regarding the compensation amounts payable, these amounts shall exclusively derive from the amounts determined by: i) the Federal Executive, by zone, by virtue of the powers vested in it by Section 98, subsection h) and Section 100 of Act 17,319, subject to the prior approval by the parties; ii) the Federal Secretariat of Energy, in accordance with the procedure set forth in Section 3 of Decree No. 6,803/68 and iii) the appropriate Argentine courts, at the request of either party. .....

—VII—
THE JURISDICTIONAL ISSUE

1. *The manifold legal relationship arising from the operation and development of hydrocarbon fields: the grantor, the concession holder, the surface owner and the province in which the fields are located.* .....

The hydrocarbon concession operated by PAE (as concession holder, and therefore, successor to the original awardees) was born and has developed under Act 17,319, as amended and supplemented. .....

As we have already noted, Act 17,319 regulates matters such as the granting of hydrocarbon exploration permits, and production and transportation concessions; the rights and duties (including the obligation to pay a concession fee) of permit holders, concession holders and surface owners (in particular sections 30, 31, 49 and 66[9]) and the monitoring,

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[9] Act No.17,319. Section 30.—*The hydrocarbon production concession authorizes* its holder to carry out, within the boundaries specified in the relevant concession instrument, hydrocarbon exploration and extraction activities according to the most rational and efficient practices; and both within and without said boundaries, but without disturbing the activities of other permit holders or concession holders, *to build and operate treatment and refining plants, communication and transportation systems, buildings, warehouses, camps and, generally, such other works and operations as are necessary to carry out its activities*. The foregoing authorized activities are subject to the provisions of this and other federal or local laws, decrees and regulations applicable in each case. .....

Section 31 (transcribed in citation 1). .....

Section 49. At least thirty (30) days before the date of commencement of the bid receipt period, whoever believes the invitation for bids is detrimental to its interests, for whatever reasons, may file a written objection with the enforcement authority, enclosing the documentation supporting his claim. The enforcement authority may temporarily suspend the invitation for tenders if it believes, at is sole judgement, that the objection will be sufficiently and documentarily supported. *No objection*

supervisory and regulatory powers of the appropriate Argentine government agencies. .....

It was under this legal framework that the relationship between the grantor (Federal Government—Secretariat of Energy), the concession holder (presently PAE), the surface owner (since 1988, FSB) and the province of Salta (as beneficiary of the royalty system) developed. This legal relationship was evidently known to FSB at the time it purchased the property, in 1998. .....

2. *Nature of applicable law and appropriate jurisdiction.* ...

As already noted, hydrocarbon fields are federal public utilities, it being for the Federal Congress, as provided by the Federal Constitution[10], to make such laws as are neces sary to fulfill their specific purposes. The Hydrocarbon Act, as supplemented, was passed under that constitutional provision. .....

This case is further subject to the application of the legal framework governing transportation and distribution of

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by any surface owner of lands located in the zone for which the invitation for tenders is issued will be admitted if such objection is based solely on the potential damage of the award, subject to the provisions of Title III of this Act. .....

Section 66. - Those who qualify as permit holders and concession holders under Parts 2, 3 and 4, Title II of this Act, shall have the rights conferred by the Mining Code §42 et seq. and related sections and § 48 et seq. and related sections with respect to the state-owned or privately-owned property located within or without the boundaries of the surface area affected by their works. . . . Under no circumstance shall the surface owner's objection to occupation of its lands or disagreement with the compensation amounts determined by the Federal Executive in accordance with Section 98, subsection h, and Section 100 of Act 17,319 be sufficient grounds to interrupt or prevent authorized works, provided the concession holder satisfactorily guarantees compensation for potential damages. .....

[10] Section 75, subsection 30 of the Federal Constitution. .....

Natural Gas (regulated by Act No. 24,076[11]), activities that are also carried out by the concession holder. .....

All matters related to the specific rules described above, as the Supreme Court has understood[12], fall within the sole and exclusive jurisdiction of the Argentine federal courts[13]. .....

The federal judiciary will exercise its jurisdictional power whenever a *federal interest* is directly jeopardized. An interest will qualify as federal based on the matter at issue (federal regulations), the persons involved or the territory in which the events take place, provided the case at issue has a critical incumbency for, relationship with, or dependence upon, the federal law or goverment[14]. .....

In the instant case, all these qualifying conditions concur, as the applicable law is of federal nature, the Federal Government intervenes out of its interest that such law be adhered to and applied to the case, that its legal powers be not impaired, that the provision of an essential public service be not hampered; and the matter involves a public utility. .....

In turn, the arguments presented should be reconciled with Section 1 of the Federal Civil and Commercial Code of Procedures, which provides that federal courts' jurisdiction cannot be avoided or excluded. .....

On the basis of the documentary evidence accompanying the complaint with respect to the arguments outlined by FSB in the action filed with the Delaware courts, we can affirm without hesitations that such matters must be solved by Argentine federal courts according to the provisions of

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[11] Official Gazette 6-12-1992 .....

[12] Opinion of legal scholars. Rulings 281:407; 293:297 .....

[13] Opinion of legal scholars. Rulings 294:60; 296:432, inter alia. .....

[14] See Haro, Ricardo, *La Competencia Federal*, Ed. Depalma, pages 28 et seq. .....

Section 4 of Act 27 and Section 2, subsection 1) of Law 48[15]. Taking into consideration the parties appearing in this dispute, the case must proceed, pursuant to Section 116 of the Federal Constitution, within the exclusive and original jurisdiction of the Federal Supreme Court[16]. .....

3. *Disputes arising out of a relationship born under Act 17,319 do not fall within international jurisdiction.* .....

In turn the arguments outlined by FSB, the Argentine surface owner in the Delaware proceedings, do not support the application of international jurisdiction. .....

Actually, the potential international nature of a dispute acquires critical significance in relation to the rights of the parties to extend jurisdiction to foreign judges or arbitrators under section 1 of the Federal Civil and Commercial Code of Procedures. Said section confers the right to extend jurisdiction only if the case is international in nature. Therefore, it is essential to determine whether this case qualifies as such[17]. .....

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[15] Section 4, Law No. 27. (the Federal judiciary) *tries and adjudicates all cases involving matters governed by the federal Constitution and federal laws, as well as matters expressly referred to in Sections 100 and 101 (presently 116 and 117) of the Constitution, provided that when it is called, under section 100, to try disputes between people of different provinces, it will do so in accordance with the respective provincial laws* .....

Section 2, Law No. 48: *Federal judges shall have original jurisdiction over the following matters: 1. those specifically governed by the Federal Constitution, the laws enacted by Congress, and public treaties with foreign countries.* .....

[16] Federal Supreme Court "*Comodoro Rivadavia TV*" dated 2-20-90, "*Wilensky*" dated 4-12-88, inter alia. .....

[17] See Boggiano, Antonio, *Derecho Internacional Privado*, Abeledo Perrot, Volume Y, page 4 et seq. .....

For a case to qualify as international, it shall involve—quoting Boggiano—*relevant objective elements* that potentially give rise to an international jurisdictional conflict. In other words, the mere dogmatic statement of the parties to the effect that the case is international in nature will not suffice, in the absence of objective, jurisdictional or substantial circumstances that relate the case to different national legal contexts, irrespective of the will of the parties. .....

The international nature of the case pending in foreign jurisdiction (Delaware), would only derive from FSB's will. Moreover, the *relevant objective elements* of said case call for the specific application of Argentine law by Argentine federal courts and authorities. .....

It can be concluded that the claim filed by FSB does not call for foreign jurisdiction nor is it an international conflict. .....

4. *The argument based on the Treaty Concerning the Encouragement and Reciprocal Protection of Investment with the United States (approved by Act 24,124) and its inapplicability to the instant case.* .....

In the initial pleading the plaintiff supported its claim for a declaratory judgement with the Treaty Concerning the Encouragement and Reciprocal Protection of Investment with the United States, as approved by Act 24,124[18]. .....

In this case, the litigation is between two companies, namely, PAE, a US company and FSB (while 99% of its shares are owned by a US company, it is organized under the laws of Argentina). .....

In addition, article II of the captioned treaty provides that each Party shall permit and treat investments, and activities associated therewith, on a basis no less favorable than that

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[18] Official Gazette 9-25-1992. .....

accorded in like situations to investments or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions for the sectors or matters listed in the Protocol to the Treaty. .....

Each Party agrees to notify the other Party before the effective date of the Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. .....

In line with the foregoing, section 5 of the Protocol provides that *Pursuant to the provisions of paragraph I, Article II, the Argentine Republic reserves the right to make or maintain limited exceptions to national treatment in the following sectors: real estate in frontier areas; air transport; shipbuilding industry; nuclear energy plants; uranium mines; insurance;* ***mining****; fishing.*

In turn, paragraph a), article X provides that the Treaty shall not affect laws and regulations, administrative practices or procedures, or administrative or judicial decisions of either Party. .....

We may only conclude from the exegesis of the above mentioned provisions that the Treaty guarantees are not applicable to the dispute between the concession holder and the surface owner or to a relationship of the nature contemplated herein between two companies. .....

On the other hand, even if the Treaty were deemed applicable to the instant case, there are no grounds to claim that during the concession term the Federal Government's conduct towards the parties involved contravened any provision of the Treaty.

—VIII—

THE INSTITUTIONAL SIGNIFICANCE OF THIS CASE

The present case has institutional significance, insofar as the basic institutions of the Nation are at risk. .....

We are facing the possibility that one or more rulings by a foreign court might jeopardize the exercise of the Executive's powers, the authority of laws enacted by the Federal Congress and the jurisdiction of the Federal Supreme Court. .....

The Federal Government cannot consent to this situation, beyond the fact that the suit pending in the foreign court is a jurisdictional absurdity, a sort of excessive "*globalizing remedy*" with no legal support under Argentine or international public law. .....

The Federal Government cannot remain indifferent to the possibility that gas production in the Acambuco area could be somehow affected, since it constitutes the basic input for the public service of gas distribution. The Acambuco Area is one of the major production areas in the Argentine Northwestern Basin, and continuous gas supply is essential to meet the requirements of the people and industries established in said region. .....

It is clear that what is at risk is no less than the satisfaction of Argentine public service basic needs. .....

Institutional significance further resides in the fact that the enforceability of Acts 17,319, 24,076 and 24,065 is jeopardized, since any jurisdictional intervention in hydrocarbon field development and operation could affect gas supply to the gas distribution concession holder which satisfies the gas requirements of thermal power plants in Argentina. .....

As Your Honor may appreciate, the Federal Government's interest in this action goes beyond the interests of the parties involved and thus becomes a matter of State concern where

Argentine sovereignty and provision of public services are at stake. .....

—IX—

EVIDENCE AND QUESTION OF LAW

Pursuant to section 333 of the Federal Civil and Commercial Code of Procedures, we offer at this stage of the process evidence supporting the rights of this party. .....

The only evidence that my party can offer is the concession contract for the relevant area. .....

Accordingly, I hereby offer that contract, in case any of the parties should disclaim its existence, and then only if Your Honor should find it necessary, as the approval, implementation and effectiveness of the concession contract arises out of the legal provisions referred to herein (contract No. 20,510 was approved by Decree No. 3.121/79—Official Gazette 12-13-1979). .....

Otherwise, in light of the fact that the defenses outlined herein involve questions of law, it will be appropriate to enter judgement without trial according to the provisions of Section 360, paragraph 6 of the Federal Civil and Commercial Code of Procedures. .....

—X—

PETITION

Now, therefore, we hereby respectfully request Your Honor as follows: .....

1) To enter record of our appearance, as a party hereto in the capacity claimed, and of the domicile *ad litem* herein established. .....

2) To enter record of the answer, in due time and manner, of the summons to the Federal Government. .....

3) To take into account our statements in Chapter II hereof regarding our non-consent to facts alien to the purposes of the declaratory action. .....

4) To take into account our statements in Chapter IX with respect to the evidence offered. .....

5) To rule on this matter taking into account the Federal Government's arguments outlined herein. .....

AND JUSTICE SHALL BE DONE.....

[Illegible signature] María Ida A. Ricardone, Attorney-at-law-CPACF, Volume 19, Folio 247 .....

[Illegible signature] María Cecilia Pintos Prat, Attorney-at-law-CPACF, Volume 11, Folio 786 .....

and

[Illegible signature] Silvia M. Palacios—Attorney-at-law—C.P.A.C.F. Volume 65, Page 492 .....

[Illegible signature] Horacio Daniel Rosatti-Treasury Department General Attorney .....

Federal Supreme Court-Original Proceedings .....

September 12, 2003, 11:15 [illegible signature and seal].....

APPENDIX D

Horacio A. Grigera Naón

Doctor en Derecho

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C.A. No. 20135-NC

CANDLEWOOD TIMBER GROUP LLC and
FORESTAL SANTA BARBARA SRL
Plaintiffs,

v.

PAN AMERICAN ENERGY LLC,
Defendant.

Affidavit of Horacio A. Grigera Naón

I. *Introduction*

1. I am an Argentine citizen currently residing in the U.S.. At present, I am Special Counsel to the international law firm White & Case L.L.P., an international arbitrator, and a member of the bars of Buenos Aires, the Argentine Federal Court and the Argentine Supreme Court. I am also a member of the bars of the U.S. Supreme Court, New York and the District of Columbia. I have taught private international law in Buenos Aires, Argentina from 1976 to 1989 as Adjunct Professor of Law at the law school of the Museo Social Argentino University and at the Facultad de Derecho y Ciencias Sociales de la Universidad de Buenos Aires. Also in such capacity, I have taught international commercial law and conflict-of-laws at the Washington College of Law, American

University, Washington D.C. I hold two doctorates, one from the Facultad de Derecho y Ciencias Sociales de la Universidad de Buenos Aires, and another from Harvard University. Both doctorates and doctoral theses specifically covered conflict-of-laws issues and problems in the field of international commercial arbitration. Two of the books authored by me—written and published in the English language—also deal with such issues. The first one is based on my Harvard doctoral thesis, and the second one reflects my private international law lectures at the Hague Academy of International Law in the summer of 2001. In addition, I have published over 70 articles in English, French, German and Spanish on international arbitration, conflict-of-laws and international business law, most of them in leading law journals or books of world-wide circulation. As a practitioner in the area of international business law and international law since early 1981, and also because of my three year tenure as Member of the International Court of Arbitration of the International Chamber of Commerce (1991-1993), my five-year tenure (1996-2001) as Secretary General of the International Court of Arbitration of the International Chamber of Commerce, and my practice as international arbitrator, I have been continuously exposed to private international law or conflict of laws problems and their practical and theoretical consideration from both a strictly national, and a broadly comparative law or international, perspective.

2. This affidavit is intended to issue a legal opinion on the Argentine private international law principles and rules governing the international jurisdiction of Argentine courts in connection with the claims brought by Candlewood Timber Group LLC et al. v. Pan American Energy LLC in the Court of Chancery in the State of Delaware, United States of America and other related matters.

3. For the purposes of this opinion I have reviewed briefs or written pleadings filed in the case (the "Delaware Case")

before the Court of Chancery in the State of Delaware in and for New Castle County entitled Candlewood Timber Group I.L.C. and Forestal Santa Barbara, S.R.L. vs. Pan American Energy LLC, CA No. 20135 (the "Delaware Pleadings"), including affidavits from Professors Edmundo F. Catalano, Saúl Litvinoff and Arthur T. von Mehren, and briefs or written pleadings filed in the case before the Supreme Court of Justice of the Argentine Republic (the "Supreme Court Case") by Pan American Energy LLC, Sucursal Argentina ("PAE") against Forestal Santa Bárbara S.R.L., Candlewood Timber Group LLC, John C. Gordon and Ralph Schmidt (the "Supreme Court Pleadings"). The Supreme Court Pleadings filed by PAE names as interested third parties in the Supreme Court Case the Argentine National State, the Province of Salta and BP Argentina Exploration Company (Argentine Branch). Both plaintiffs in the Delaware Case shall be hereinafter jointly referred to as "Candlewood".

4. I have been requested to deliver this legal opinion by PAE to determine whether, under Argentine law, the matters and disputes covered by the Delaware Pleadings and the Supreme Court Pleadings fall, in full or in part, under the exclusive jurisdiction of Argentine courts. Thus, although this legal opinion may also contain references to national legal systems other than the Argentine legal system, it does not purport to be a legal opinion under national laws other than the laws of Argentina.

II. *The Argentine Private International Law Framework*

A. *The Argentine National Code of Civil and Commercial Procedure.*

5. Article 1 of the National Code of Civil and Commercial Procedure of the Argentine Republic ("C.Pr.") sets out principles concerning the international jurisdiction of Argentine courts, including the national and federal courts of Argentina.

According to such principles:

(i) the jurisdiction of Argentine national and federal courts cannot be avoided or excluded through choice of forum stipulations or by initiating legal proceedings in a different forum, including a foreign forum;

(ii) however, in cases exclusively of a pecuniary or financial nature, *all* the parties to the contract or the dispute may agree to opt out of the jurisdiction of federal courts that would otherwise hear their disputes and refer them to:

(a) Argentine provincial judges; or

(b) foreign courts or arbitrators not sitting in Argentina when the dispute is an international one,

6. Notwithstanding the foregoing and anything to the contrary, article 1 CPr. also provides that in the following cases (i) the parties may not agree on the jurisdiction of foreign judges or arbitrators sitting outside of Argentina; (ii) Argentine courts shall have exclusive jurisdiction to hear any disputes; and (iii) the jurisdiction of foreign courts shall not be recognized or accepted :

(x) when Argentine courts have exclusive jurisdiction to hear the dispute; and

(y) when a specific legal rule or treaty provision prohibits choice-of- foreign forum clauses or resorting to foreign courts.

B. *The Argentine National Constitution and Federal Laws and the International Jurisdiction of Argentine Courts.*

7. Articles 116 and 117 of the Argentine Constitution ("CN") determine the jurisdiction of the Argentine Supreme Court ("SC") and the other Argentine Federal Courts depending on the nature of the persons involved (jurisdiction *ex ratione personae*) or on the subject matter of the dispute (jurisdiction *ex ratione materiae*).

8. According to article 116 CN, the Argentine Federal Courts—and the SC by way of appeal, i.e., as appelate court reviewing decisions made by the lower Federal Courts (*jurisdicción apelada* of the SC)—shall hear and decide *all* disputes concerning matters governed by the CN or Federal Laws. In its turn, article 117 CN identifies those matters and disputes that must be exclusively and directly heard and decided solely by the SC (*jurisdicción originaria* of the SC). Matters or disputes involving the Argentine State are expressly covered by article 116 CN. Matters or disputes involving an Argentine Province are expressly covered by article 117 CN.

9. Federal Law 48 on the Jurisdiction and Competence of National and Federal Courts further develops and expands[1] the provisions contained in articles 116-117 CN on the disputes or matters falling under the jurisdiction and competence of the Argentine Supreme Court of Justice and the other Federal Courts or introduces regulations also governing such matters.

10. Article 12 of Law 48 establishes that Federal Courts jurisdiction to hear disputes under articles 1, 2, and 3 of Law 48 shall be exclusive (i.e., cannot be avoided by resorting to Argentine provincial courts or through choice-of-forum clauses in favor of such courts). Article 1(1) of Law 48 provides for the sole and exclusive jurisdiction of the Argentine Supreme Court of Justice to hear and decide disputes involving an Argentine Province and a resident of another Argentine province, or a foreign citizen. Article 2(1) Law 48 further provides that Federal judges shall decide disputes

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[1] C. Zavalía, 1 Derecho Federal, 3d. Edition, Compañia Argentina de Editores, at 323 (1941).

governed by the Argentine National Constitution and laws made by the Argentine National Congress[2].

11. Although by defining the matters or disputes reserved to the exclusive jurisdiction of the SC and the Federal Courts the letter of article 12 of Law 48 apparently only preempts the jurisdiction of provincial courts on such matters or disputes, both doctrinal works and case law concur in that such provision, in tandem with articles 1 and 2 of Law 48, as well as articles 116-117 CN, also determine and define the exclusive international jurisdiction of the SC and other Federal Courts of Argentina; i.e., in connection, not only with contracts, juristic relationships or transactions not exclusively connected with or localized in Argentina, but also in respect of contracts, juristic relationships or transactions showing contacts with foreign countries.

12. For example, when the dispute at stake falls within the purview of (a) the sole and exclusive jurisdiction of the SC under article 117 CN and articles 1 and 12 of Law 48, or (b) the jurisdiction of Argentine Federal Courts (and the appelate jurisdiction of the SC) under articles 116 CN and 2 and 12 of Law 48, because the dispute arises out of matters governed by the Argentine Constitution or Federal Laws, such disputes (i) must be exclusively decided, as the case may be, by the SC or the Federal Courts of Argentina; (ii) are excluded from the jurisdiction of the courts of any other country; (iii) decisions by the courts of foreign countries on such disputes shall not be recognized or enforced in Argentina; and (iv) the parties to the dispute may not exclude Argentine SC or Federal Court jurisdiction through choice-of foreign forum clauses or

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[2] These are "special" laws, that we shall refer to as "Federal Laws" other than the Codes (Civil, Commercial, Mining and Labor Codes) referred to in article 75 (12) CN. Such Federal Laws cover activities aimed at implementing the letter or spirit of provisions of the CN: C. Zavalía, 1 Derecho Federal, 3d. Edition, Compañía Argentina de Editores, at 16 (1941).

validly avoid such jurisdiction by litigating or arbitrating abroad or by making any appearance, including an appearance on the merits, before a foreign court of law or arbitrators sitting abroad[3].

13. Not even the Argentine State in its international dealings with private parties is entitled to exclude the exclusive jurisdiction of the SC or Argentine Federal Courts when applicable under the rules described above through choice-of-forum clauses or by consenting or submitting to the jurisdiction of foreign courts or arbitrators sitting abroad[4]. The same constitutional and federal law rules and principles apply, of course, when the contract, juristic relationship or transaction giving rise to the dispute involves a non-Argentine party (a foreign national or a company or legal entity not incorporated in or organized under the laws of Argentina) and the case is governed by the CN or Federal Laws or falls under the sole and exclusive jurisdiction of the SC.

14. Thus, a dispute involving the Argentine State in connection with matters governed by an Argentine Federal law is subject to the exclusive jurisdiction of Federal Courts although such dispute involves as well a non-Argentine party or concerns an international transaction (article 116 CN; Law 48, article 2(1). Also, a dispute involving a Province of Argentina and a non-Argentine party or concerning an international transaction is necessarily subject to the sole and exclusive jurisdiction of the Argentine Supreme Court (article 117 CN; Law 48, article 1(1)).

15. As a necessary corollary, if these rules and principles apply when the parties to the dispute have entered into a choice-of-foreign forum stipulation, it also applies absent any such stipulation despite the initiation of legal proceedings in a

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[3] SC, *Fallos* 176:218; 254:500.

[4] SC, *Fallos* 254: 500; G. Bidart Campos, II Tratado de Derecho Constitucional Argentino, Ediar, Buenos Aires, at no. 50, page 560 (1993).

foreign forum in disregard of the exclusive jurisdiction of the SC and Federal Courts set out in articles 116-117 CN or articles 1,2 and 12 of Law 48. These are issues or matters of public policy nature that, as repeatedly decided by the SC, belong to and fall within the realm of the sovereign powers and attributes of the Argentine State and cannot, for that reason, be explicitly or implicitly waived or reduced by governmental authorities or private persons[5].

16. Consequently, matters or disputes reserved to the exclusive jurisdiction of the SC and the Federal Courts pursuant to articles 116-117 CN or articles 1, 2 and 12 of Law 48 are also matters that may not be subject to the jurisdiction of Argentine provincial courts, foreign courts or arbitrators sitting outside of Argentina under article 1 C.Pr.

C. *Argentine General Private International Law Governing the International Jurisdiction of Argentine Courts.*

17. Like other national conflict-of-laws legal systems or international agreements enjoying wide international approval or consensus[6], Argentine private international law accepts the *norma o ley de policía, loi de police* or international mandatory rule methodology[7].

18. According to this methodology, a *Ley de Policía* is a substantive mandatory law of the forum enacting it that because of the policies or goals it seeks to advance, often closely associated with the public or national interest of such

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[5] SC, *Fallos* 3:484; 14:280; 176:218.

[6] For example, article 7(2) of the 1980 European Convention on the law applicable to contractual obligations, ratified by countries belonging to the European Union including Germany, France, Italy, the United Kingdom and The Netherlands.

[7] This is the terminology utilized in the U.S. to refer to *Leyes de Policía*: D. Trautman, Some Notes on the Theory of Choice-of-Law Clauses, 35 Mercer Law Review, 535 (1984).

forum, must under all circumstances necessarily, exclusively and unilaterally govern each and every matter covered by the scope of such *Ley de Policía.* The application of a *Ley de Policía* is thus not circumscribed to entirely domestic or national legal issues, situations or relationships.

19. Even when situations, issues or relationships covered by the scope of a *Ley de Policía* are international or involve non-Argentine parties, such *Ley de Policía* will claim and assert its unilateral—and in any case exclusive and overriding—application although the *Ley de Policía* does not belong to the proper law chosen by the parties to govern the contract or, absent a choice-of-law stipulation, to the proper law otherwise governing the contractual relationship. If the dispute relates to tort issues, a *Ley de Policía* shall apply to aspects of the tort dispute otherwise governed by the *lex locus delicti* or the law otherwise governing tort issues designated by resorting to connecting factors not limited to the place of tort, such as the *proper law of the tort,* irrespective of whether the *Ley de Policía* belongs or not to the *lex loci delicti* or *the proper law of the tort* . For this reason, the *Ley de Policía* private international law methodology constitutes an exception to the normal operation of general conflict-of-laws rules automatically designating the applicable law exclusively through the geographic localization of a connecting factor (e.g., place of contractual conclusion or performance, place of the tortious conduct) even if such localization may not lead to the application of the substantive law of the forum enacting the conflicts rule at stake.

20. In a federal country like Argentina, either a mandatory Federal Law or a mandatory law enacted by a Province may be or become a *Ley de Policía* entitled to application to an international case or to foreign nationals. Public national or provincial interests, policies or goals equally qualify to such purpose.

21. According to one of the leading treatises on Argentine private international law, the expression *Ley de Policía* refers to:

> ". . . a category of norms that, inspired by rigorous public policy considerations, excludes the application of conflict-of-laws rules or of any other legal rule" (. . .) Through the "normas de policía", the national legislator selects its domestic law (*lex fori*) to govern a multinational case. This is the autonomous election by the legislator of its own law—"normas de policía"—aimed at protecting certain *general and public interests* of the country [enacting them] immediately concerned by multinational activity. They stand for the impact of national interests on multinational private international law cases (. . .). Certainly, not only public economic interests characterize "normas de policía", but also public, family law, social care, and general societal, interests"[8].

22. The acceptance of the *Ley de Policía* methodology by Argentine private international law is further evidenced by the draft Argentine Code on Private International Law prepared under the auspices of the Argentine Ministry of Justice and presently being considered by the Argentine National Congress. Its article 15, entitled "*Normas de Policía*" provides that the exercise of private autonomy and the operation of conflict-of-laws rules are excluded by domestic rules enacted to protect the public interest[9].

23. It is also a generally accepted principle in comparative and Argentine private international law, that establishing whether a mandatory legal rule of the forum is or not a *Ley de Policía*, sometimes depending on the perception by the adju-

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[8] A. Boggiano, I Derecho Internacional Privado, 3a. Ed., Abeledo-Perrot, at 515, 258 (1991). My free translation from Spanish.

[9] The Spanish text of the Draft Code is attached as Exhibit 2 hereof.

dicator or the varying public policy notions of the forum[10], and necessarily requiring to find whether the conditions for the international or extraterritorial and necessary application of a *Ley de Policía* being considered are met, triggers, in parallel, the exclusive international jurisdiction of the courts of the forum enacting the *Ley de Policía*. Therefore, by asserting its own exclusive jurisdiction, such national forum denies international jurisdiction to the courts of any foreign forum to hear and decide on any disputes that may arise out of the interpretation or application of such *Ley de Policía*.

24. The main reason to assert the exclusive jurisdiction of the courts of the forum enacting a *Ley de Policía* in respect of such matters is that such courts are better equipped than foreign courts to carry out the exercise permitting to determine whether the mandatory rule at stake is or not a *Ley de Policía* entitled to apply to cases involving foreign elements or foreign parties and whether such *Ley de Policía* shall apply or not to the dispute at hand. In such exercise, obviously requiring a proper understanding and evaluation of the criteria defining the conditions of application, meaning and scope of the *Ley de Policía*, the identification of the policies and goals embodied in the *Ley de Policía* or the national or public interest underlying them, as well as measuring their intensity and relevance in view of the disputed issues at stake, play a paramount role.

25. It is generally accepted, in this connection, that assessing the intensity of the public or national interest underlying the *Ley de Policía* plays a decisive role to conclude on its extraterritorial application or in respect of foreign nationals or residents. No wonder then that the unilateral and overriding application of a *Ley de Policía* may be only adequately ensured through the exclusive intervention of the courts of the

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[10] I. Weinberg, Derecho Internacional Privado, 2nd. Edition, Depalma, at 52 (2002).

enacting forum as the ones placed in the best position to establish if the *Ley de Policía* shall apply or not to the disputed issue at stake, which also implies adjudicating on the scope of application of the *Ley de Policía*. Such overriding application is not guaranteed if the equally overriding jurisdiction of the courts of the enacting forum is not secured in tandem. Clearly, by ensuring the exclusive jurisdiction of the courts of the enacting forum, any possible maneuvering aimed at baffling or avoiding the application of the *Ley de Policía*—for instance, through a choice-of-foreign forum stipulation—is forestalled or denied effects.

26. Thus, under Argentine private international law, whenever the decision of a dispute turns around the existence, interpretation or application of a *Ley de Policía* enacted by the Argentine legislator, the exclusive jurisdiction of Argentine courts follows[11] even if the disputed issue is international because it presents elements or contacts with foreign jurisdictions that would otherwise lead to recognizing, from the perspective of the Argentine legal system, the existence of concurring international jurisdiction of foreign courts to decide on such issue. For example, if the application of an Argentine *Ley de Policía* is at stake, it shall command the exclusive jurisdiction of the Argentine courts, although the defendant or respondent has its domicile or residence, or is incorporated, in a foreign country.

27. Although the evaluation of the interests, goals or policies underlying the forum mandatory legal rule being considered as a *Ley de Policía* plays a central role in the process of weighing and balancing the different factors having a bearing on the determination of the existence and scope of application of the *Ley de Policía* , such process is not indifferent to

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[11] A. Boggiano, I Derecho Internacional Privado, 3d. Ed, Abeledo Perrot, at 258 (1991).

the consideration of geographic or territorial contacts between the national forum enacting the *Ley de Policía* and the dispute at hand.

28. Actually, under Argentine private international law, the prevailing localization of the legal or juristic relationship giving rise to the dispute in Argentina enhances the relevance, strength and intensity of the policies, interests or goals of Argentine mandatory rules qualifying as *Ley de Policía* on which their application to international cases or foreign nationals is premised. This is consistent with a conflict-of-laws principle accepted by the U.S. Supreme Court, according to which "contacts create interests"[12].

29. The relevance of the geographic localization of the transaction to determine if mandatory rules of the forum qualify as *Leyes de Policía* becomes particularly poignant or meaningful when, because of such localization (for example, because the contract has been made or the business or legal relationship giving rise to the dispute has come to life in the forum, the ensuing rights and obligations are to be performed in the forum, and the domicile or residence or legal existence of at least one of the parties concerned is located in such forum or flows from its laws), not only the transaction is closely or most significantly connected with such forum, but also when in the instant case, the laws of such forum shall govern the contract or transaction under such forum's general conflict-of-laws rules. Such would be the case under Argentine private international law if the contract is made and performed or to be performed in Argentina, there is no choice-of-law stipulation excluding the application of Argentine law, and the *Ley de Policía* being considered belongs to the Argentine legal system. The same conclusion is necessarily reached when the disputed issue is one of tort, and not

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[12] U.S. Supreme Court, *Allstate Ins.Co. v. Hague*, 449 U.S. 302, 308 (1981).

of contract, if the tort is localized in Argentina and the application of an Argentine *Ley de Policía* in respect of an aspect of the tortious conduct or its effects is considered[13]. In such scenario, the localization of the legal relationship in the forum (a) enacting the *Ley de Policía*; and (b) whose substantive law is to govern such legal relationship under its general conflict-of-laws rules, not only may substantially contribute to the application of such *Ley de Policía* to a dispute arising out of such legal relationship, but also strengthens the claims of the courts of such forum to assert their exclusive jurisdiction on any matters concerning such *Ley de Policía* or its application.

30. One concrete example of the *Ley de Policía* methodology under Argentine law is article 10 of the Argentine Civil Code providing that all matters regarding, *inter alia,* the rights of the parties related to an immovable are necessarily governed by the *lex situs*, or laws of the country where the immovable is located[14]. Consequently, any disputes between such parties are both governed by Argentine law and subject to the exclusive jurisdiction of Argentine courts if the immovable is located in Argentina.

31. It is interpreted that article 10 of the Argentine Civil Code extends the application of the laws of the country where

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[13] Under Argentine private international law, torts are governed by the law of the country where the tort takes place: article 8, Argentine Civil Code; article 38, 1889 Montevideo Treaty on Civil International Civil Law; article 43 Montevideo Treaty on International Civil Law. Argentine private international law has not echoed doctrines purporting to establish a *proper law of the tort* to determine the applicable law, which under certain circumstances could lead to the application of a national law other than the law of the country where, for example, the tortious conduct took place.

[14] A. Boggiano, 1 Derecho Internacional Privado, 3d. Edition, Abeledo-Perrot, at 1021 (1991): this author considers article 10 Arg. Civil Code as a *Ley de Policía* operating as a *lex specialis* constituting an exception to the application of general conflict-of-laws rules.

the immovable is located to every legal relationship directly concerning or relating to such immovable save the capacity of the parties to enter into a contract relating to an immovable[15]. Consequently, disputes arising out of such relationships are necessarily subject to the jurisdiction of Argentine courts. However, to properly identify the types of claims or legal actions relating to immovables falling under the exclusive jurisdiction of Argentine courts, it is appropriate to seek further guidance by looking into the provisions found in the Private International Law Treaties of Montevideo of 1889 and 1940 ratified by Argentina. It is generally accepted under Argentine private international law that recourse should be had to the provisions found in the Treaties of Montevideo of 1889 and 1940 ratified by Argentina to interpret, complement or supplement private international law provisions found in the Argentine Civil Code. Article 67 of the 1889 Montevideo Treaty on International Civil Law and its identical counterpart, article 64 of the 1940 Montevideo Treaty on International Civil Law, provide that both actions *in rem* and actions or claims having "mixed nature" (*naturaleza mixta*) must be introduced before the courts of the country where the immovable is located. Mixed nature actions or claims are those relating to personal rights that only come into existence because of the rights *in rem* held by the claimant in connection with an immovable, such as the right to obtain a compensation for damages caused to the property owned by the claimant. Consequently, any mixed nature legal actions or claims relating to property located in Argentina are subject to the exclusive jurisdiction of Argentine courts and excluded from the jurisdiction of foreign courts.

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[15] C. Vico, 1 Curso de Derecho Internacional Privado, 2nd. Edition, Biblioteca Jurídica Argentina, at 402 (1967).

III. *The Argentine Private International Law Framework and the Delaware and Argentine Supreme Court Cases*

32. The Delaware Pleadings show that the Candlewood claims cannot be decided without at least seriously considering the possible application of Argentine laws and regulations governing matters concerning (1) environmental and ecological protection and the rational exploitation of forests, and (2) hydrocarbon operations and the exploitation of mineral resources. The existence of damages and their measure alleged by Candlewood in the Delaware Case require the adjudication to consider and determine whether there is conduct attributable to any of the parties infringing legislation or regulations governing such matters. Accordingly, it is also necessary to look at the provisions of the CN and Argentine Federal Laws or belonging to general Argentine Private International determining the exclusive application of Argentine substantive law to such matters, also closely associated with the exclusive jurisdiction of Argentine courts to adjudicate on them.

1) *Environmental Law Issues*

33. Candlewood claims that conduct attributed to PAE that would have caused damage to Candlewood would have prevented Candlewood from managing forests in Acambuco in agreement with "international standards of sustainable forestry" and thus from "securing certification from an internationally recognized forestry organization that the forest lands (. . .) are being managed in a sustainable manner"[16]. Without such certification, Candlewood claims that it is unable to raise capital, expand its business to other forest areas and market its forest products in the U.S.A.[17] Furthermore, Candlewood claims that PAE conduct has caused or is likely to cause

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[16] Second Amended Complaint, at 1.

[17] Second Amended Complaint, at 4.

environmental damage by creating a risk of "massive erosion" and increasing erosion and stream sedimentation. PAE would have also failed to "revegetate cleared lands, creating a significant erosion hazard"[18]. Such conduct would have resulted ". . . in a significant degradation of the environment and biodiversity of the Candlewood Forest Property"[19] .

34. Consequently, deciding on Candlewood's claims will necessarily require determining the applicable law or legal rules regarding (i) "sustainable forestry" and the management of forests in a "sustainable manner"; and (ii) environmental protection binding on PAE which, if infringed by PAE, would have caused damage to Candlewood business. Exclusively for the purpose of analyzing applicable law and court jurisdiction matters, reference is made below to salient aspects of Argentine Federal and Provincial public law mandatory regulations covering such matters. Coverage or analysis below of legislation or regulations is not and does not attempt to be exhaustive, is merely demonstrative, and reference is here made to the more comprehensive and descriptive coverage that may be found in Professor Edmundo F. Catalano's affidavit dated June 18, 2003, and Mr.Catalano's supplemental affidavit.

35. The protection of the environment is governed by rules and principles of the CN and general Federal legislation, including Federal legislation or regulations specifically applicable to oil and gas operations, and Provincial legislation and regulations.

36. Article 41 CN sets forth mandatory rules and principles for the protection of the environment that shape the Argentine Federal and Provincial legislation and regulations on environment protection. Thus, article 41 CN sets forth the public

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[18] Second Amended Complaint, at 11.

[19] Second Amended Complaint, at 12.

policy and mandatory pattern necessarily governing environmental protection in Argentina both at the Federal and Provincial level on the basis of the creation and preservation of a healthy, balanced and suitable environment for human development and responsive to the principle of sustainable development; i.e., that productive activities must satisfy current needs without sacrificing the needs of future generations. Among other things, article 41 CN imposes a paramount obligation under the applicable law to cure or correct any damage caused to the environment. This article also provides that it is incumbent on the Federal Government (la *Nación*) to promulgate legislation setting forth minimum environmental protection standards and on the Provinces to enact all necessary complementary legislation. Consequently, Federal and Provincial legislation on environmental and sustainable development matters are aimed at implementing the constitutional mandate spelled out in article 41 CN.

37. Federal law 25675 providing for a National Environmental Policy sets out the minimum requirements for the sustainable and adequate management of the environment, the preservation and protection of biological diversity and the implementation of sustainable development (article 1). Its article 3 establishes that law 25675 provisions are mandatory (belong to Federal public policy), immediately applicable ("*operativas*"), apply in the entire Nation's territory, and shall govern the interpretation of specific legislation on the matters covered by this Federal law, whose provisions and underlying principles are however supermandatory and supersede any contrary or incompatible legal provisions or regulations. Articles 27-33 of this Federal law specifically legislate on licit and illicit conduct causing environmental damage having a collective impact or impacting the community. Environmental damage is broadly defined as any relevant change or alteration negatively modifying the environment, environmental resources, the equilibrium of ecosystems, collective values, or the collective heritage. These articles also introduce

legal rules or principles applying to criminal and civil or private law legal actions based on the violation of the Federal law and regulations on the protection of the environment. Article 29 specifically provides that the violation of public laws for the protection of the environment creates a rebuttable presumption as to the penal and civil or private law liability of the person incurring in such violation, thus reversing the burden of proof that would otherwise apply under the Argentine Penal or Civil Code. Article 32 of Federal law 25675 emphasizes the public interest and public policy nature of violations of the Federal legal framework for the protection of the environment by authorizing the intervening judge to adopt on its own initiative all necessary measures to determine the existence of damage to the environment in order to protect the general interest and entitling him, when sentencing, to decide on matters or issues not expressly submitted to his decision by the parties.

38. Federal Hydrocarbon Law 17319 specifically governs the obligations of oil and gas operators holding concession rights granted under its provisions regarding the protection of the environment (article 69 e)). These matters are further covered by regulations issued by the Federal Government, such as Resolutions 105/1992 and 342/93 of the *Secretaría de Energía*, the Enforcing Authority of Law 17319 under its article 97, that is part of the Executive Branch of the Federal Government. Resolution 105 approves mandatory rules and procedures set forth in its Annex I for the protection of the environment in the course of hydrocarbon exploration and exploitation activities (article 1) which require, among other things, the preparation of studies on the environmental impact of such activities to prevent or reduce such impact, minimizing the destruction of existing plantations, preserving the environment, and forestalling or preventing erosion of the soils. Law 24585 modifying the Mining Code introduces a specific regime applicable to the holders of mining rights

establishing their obligations regarding the protection of the environment when carrying out mining activities and providing for sanctions in case of infringement of such obligations.

39. The Argentine province of Salta, where the Acambuco area and the Candlewood Forest Property are located, also has provincial legislation regarding these matters.

40. Provincial Law 7070 on Environmental Protection (article 1) declares of provincial public interest, among other things, all actions, activities, programs and projects destined to preserve, protect, defend, improve the environment, the biodiversity, the natural resources, within the context of sustainable development within the Province of Salta. Thus, the provisions of this law and of rules or regulations implementing it are mandatory and a part of the province's public policy. According to its article 2, the purpose of this law includes issuing rules governing the relations between the inhabitants and the environment, ecosystems, natural resources and biodiversity. This law defines sustainable development as any activities, actions and projects aimed at improving the economy and the welfare of the inhabitants under conditions guaranteeing the integrity of the environment (article 3). Article 3 provides for the issuance by the competent authority of certificates establishing that the private activity being considered ensures the sustainable development. Article 54 (a) defines as a controlled activity an activity having an environmental impact that requires obtaining an authorization from the competent provincial authority that shall analyze and define the compliance of such activity with, as the case may be, provincial and municipal laws, rules and regulations concerning the environment. According to article 11 of this law, the provincial State of Salta has the unconditional duty to protect the environment, oversee the rational utilization of natural resources, prevent or interrupt the degradation of the environment, and define environmental policies aimed at conciliating the protection of

the environment and economic activities. Articles 12-16 define legal actions that may be introduced in case of conduct harmful to the environment before the provincial administrative and judicial authorities. The public interest nature of the such actions and remedies is underscored by the fact that if the court finds that the claimant is not legitimated to introduce the claim but that the claim is not frivolous, the court will transmit the case to the Office of the Public Attorney (*Ministerio Público*) to permit the further continuation of the case. Legal actions before the courts of the province of Salta based on the violation of this law and any regulations or other legal rules that may ensue as a result of its provisions may lead to penal, civil or administrative responsibility (article 128).

41. Provincial Law 7107, creating a Provincial System of Protected Areas applies to areas in the province of Salta that are subject to planning and processes aimed at achieving a sustainable level of utilization of the natural resources in the province. This law was passed pursuant to article 98 of Provincial Law 7070 on environmental protection. Any violations of Provincial Law 7107 are governed by provisions of Provincial Law 7070. According to article 3 of Provincial Law 7107, Protected Areas are part of the provincial heritage, and establishing, conserving, preserving and protecting them is a matter of provincial public interest, and therefore governed by mandatory or public policy rules and regulations of the province of Salta. Habitat, biological diversity and sustainable development are listed in article 4 of provincial Law 7107 among the technical notions taken into account for the rational regulation, oversight and control of provincial Protected Areas. Articles 34-35 provide for the creation of a body of inspectors and an Enforcement Authority charged, among other things, with looking after the application of this law and any programs, plans Articles 48-51 refer to the limitations on property rights that may be imposed by the provincial Enforcing Authority in connection with a Protected

Area and the expropriation of property in a Protected Area when restrictions to property rights exceed certain limits. The Candlewood Forest Property is a Protected Area under provincial Law 7107.

42. Forests and forest areas are covered by the Federal Law for the Defense of Forest Resources issued by the Argentine Federal Government (Decree 710/95), which replaces similar federal legislation (law 13273 and ensuing laws and regulations) and applies, *inter alia*, to forests in provinces having adhered to this law (article 2 (b)). By adhering to this law, the federal forest regime becomes applicable in the adhering province (article 4(c)), which includes the provisions found in Chapter V of the Federal Law for the Defense of Forest Resources governing, among other things, the exploitation and utilization of forest resources. The Province of Salta had already adhered through Provincial Law 5342 to law 13273 to the federal forestal regime set out above. Article 30 of Law 5342 declares the province's public policy nature of its provisions, which are therefore mandatory. Its article 2 provides that the defense, conservation, regeneration, improvement and expansion of forests as well as planting productive forests is of provincial public interest.

43. The above eloquently shows that environmental protection matters, including without limitation those regarding the protection and preservation of forests, constitute a heavily regulated area under Argentine law through legislation and regulations of mandatory nature explicitly seeking to advance and protect the public or general interest and to further essential public and state—Federal and Provincial—policies in that area. In order not to defeat their goals or objectives, that would not be attained should their application not be assured, such laws and regulations require their necessary, overriding and unilateral application irrespective of the nationality or origin of the parties concerned or involved in the dispute falling within their scope. From the private interna-

tional law perspective, all these rules or regulations are Argentine Federal or Provincial *Leyes de Policía* commanding, for their interpretation and application, the exclusive jurisdiction of, as the case may be, federal courts or provincial courts.

44. As far as environmental protection and forest protection matters covered by Federal Laws or regulations are concerned, the exclusive jurisdiction of Argentine Federal courts to decide on disputes covered by them also flows from specific provisions found in article 116 of the Argentine Constitution and 2(1) and 12 of Federal Law 48—which command the exclusive jurisdiction of Federal Courts and the appelate jurisdiction of the SC to decide on disputes arising out of the application of Federal Laws or regulations—and not just from the fact that such laws or regulations also qualify as *Leyes de Policía* under Argentine private international law.

45. The above conclusion is butressed by the fact that the relationship between PAE and Candlewood, or any tortious conduct attributed by Candlewood to PAE, is exclusively localized in Argentina. Thus, under general Argentine private international law principles already explained, any contract law or tort law matters arising out between Candlewood and PAE are governed by Argentine law, including the Federal and Provincial legislation and regulations on environment and the protection of forests referred to above. This strengthens the application of such legislation or regulations as *Leyes de Policía* to cases not exclusively involving Argentine parties, residents or domiciliaries and the accompanying exclusive jurisdiction of Argentine courts—Federal or Provincial—to decide any matters regarding the interpretation, scope and application of such legislation and regulations.

46. On the basis of Candlewood's claims, it must be concluded that they relate, at least *prima facie*, to issues and conduct falling within the scope of environment and forest

protection Federal and Provincial legislation and regulations described above whose consideration and application cannot be avoided to establish if PAE is liable or not. Be such legislation and regulations characterized as Federal or Provincial *Leyes de Policía* or as Federal Law covered by article 116 CN and the concomitant provisions of Law 48, their interpretation and application in full or in part to the effect of determining such liability requires and commands the exclusive jurisdiction of Argentine courts—Federal or Provincial—and are excluded by Argentine law from the jurisdiction of any foreign courts.

2) *Legal Issues Regarding Oil & Gas Concession Holder and Surface Owner Rights*

47. The Delaware Pleadings also require the consideration of issues concerning the relationship between the holder of oil and gas or mineral rights and the surface owner to determine if the conduct of PAE when building and operating roads through Candlewood property inflicted damages entitling Candlewood to seek and obtain compensation from PAE. This in its turn requires analyzing the applicable law governing the respective rights of and the relationship between the oil and gas and mineral rights holder and the surface owner and determining which courts have jurisdiction to adjudicate disputes arising out of such relationship or in connection with such rights.

48. The relationship between the holder of oil and gas rights and the surface owner and their reciprocal rights are governed by Federal Law 17319, article 66-71, and by the Mining Code provisions referred to in article 66 Federal Law 17319. Such provisions respond to the public interest in facilitating the exploration and extraction of a vital natural resource both constituting an important source of revenue for the National State and Provincial State and one of the vital motors of the economic activity in the country. It is a fact that the welfare

of the Argentine people would suffer a serious adverse impact should oil and gas operations in the Argentine territory and their beneficial economic consequences be disrupted, interfered with or reduced. For that reason, such provisions introduce important limitations based on public policy considerations to the property rights of the surface owner to the benefit of the holder of oil and gas rights, including the latter's right to establish easements on the surface owner property and to compel the sale of surface land located within or outside the field (Professor Catalano's affidavit, pages 3-4).

49. Thus, Federal Law 17319 subordinates and limits the rights of the surface owner to facilitate the public interest operation of the holder of oil and gas rights, and for that reason, any aspect of their relationship requires to carefully weigh and balance all the interests involved, including the public National and Provincial interests in oil and gas operations. Therefore, the relationship between the holder of oil and gas rights and the surface owner must be examined in light of such public interests and the provisions and spirit of Federal Law 17319 and provisions or resolutions and regulations relating to such provisions. Such regulations include Resolution No. 145/71 from the Minister of Public Works of the Argentine National Government regulating the surface works carried out by holders of oil and gas rights under Federal Law 17319, which also provides for the jurisdiction of local authorities and courts to receive any claims or protests from surface owners originated in the activities of the holders of oil and gas rights (Section 4.3).

50. Consequently, determining whether PAE actions went beyond conduct allowed to a holder of oil and gas rights in respect of the surface owner is not merely a private law matter between private economic operators and has to be examined against the backdrop of the public law regime concerning them. Such public law regime, embodied in Federal Law 17319 and related provisions in the Mining

Code incorporated by reference into Law 17319, triggers the exclusive jurisdiction of Argentine Federal courts both (a) because their provisions qualify as *Leyes de Policía* under Argentine private international law in a situation where the latter, because of the localization of the legal relationship, also points out to the general application of Argentine law to govern all of its aspects; and (b) on account of the exclusive jurisdiction vested in Argentine Federal courts pursuant to article 116 CN and article 2 of Federal Law 48 since Law 17319 is a Federal Law.

51. The exclusive jurisdiction of Argentine courts to decide on the claims filed in the Delaware Case is also triggered by the fact that Candlewood's claims cannot be decided without determining the scope and limitations of Candlewood's real property rights on the surface of the Acambuco Area and on the forests located on such surface vis-à-vis the rights of similar nature of PAE on Candlewood's property, which are all exclusively governed by Argentine law according to article 10 of the Argentine Civil Code commanding, as *Ley de Policía*, the application of Argentine law (including Law 17319, the Mining Code and Federal and Provincial legislation concerning environment protection and the protection and preservation of forests) to all real right issues concerning immovables localized in Argentina, including the scope and existence of such rights and other legal rights associated with such rights.

52. In fact, the damage claims filed by Candlewood against PAE in the Delaware Case find their direct source in Candlewood's real property rights and the interpretation of their significance and scope and are thus to be considered either as relating to and depending on the delimitation of the respective rights of PAE and Candlewood on or in respect of a specific sector of the surface of the Acambuco Area, or as qualifying as "mixed" legal actions or claims (having mixed *in rem* and *in personam* characteristics) relating to such rights. In both

cases, Argentine courts hold exclusive jurisdiction to decide disputes between Candlewood and PAE under article 10 Argentine Civil Code (a *Ley de Policía*) or under article 64 of the 1889 Montevideo Treaty on International Civil Law and article 67 of the 1940 Montevideo Treaty on International Civil Law providing for the exclusive jurisdiction of the courts of the country where the immovable is located on "mixed" legal actions regarding such immovable.

3) *The Exclusive Jurisdiction of the Argentine Supreme Court to Decide on the Disputes Covered by the Delaware and Supreme Court Pleadings*

53. As shown, the Delaware and Supreme Court Pleadings concern vital public interests of Argentine national and provincial dimension relating to the protection of the environment and the ecosystems, the protection and preservation of forests playing an essential role in the preservation and protection of the natural environment, the possibility of pursuing sustainable development and productive and economic activities in a vital area affecting the national and provincial economy, the interaction between the mining rights of the oil and gas operator and the surface owner, all of them protected by provisions found in the National Argentine Constitution, the Constitution of the Province of Salta, and public federal and provincial laws, the provisions of which are mandatory and also qualify as *Leyes de Policía* under Argentine private international law.

54. Furthermore, the legal relationships or activities giving rise to the Delaware and Supreme Court Cases are entirely localized in the Argentine Republic and in the Argentine Province of Salta and indisputably governed by Argentine law under Argentine conflict-of-laws—and one could also safely say, also under U.S. conflict-of-laws. There is no choice-of-law stipulation between Candlewood and PAE pointing to the application of foreign law to their relationship.

On the contrary, there are certain agreements between the parties that do contain Argentine forum selection clauses (see Annex 1).

55. The above circumstances overwhelmingly militate in favor of accepting—at least on a *prima facie* basis—that the Argentine National State and the Province of Salta have a paramount and justified interest in becoming parties to legal proceedings in Argentina relating to the dispute covered by the Delaware and Supreme Court Cases. On account of such circumstances, the Province of Salta has supported PAE's position that Argentine courts have exclusive jurisdiction on the dispute, and in all likelihood the Argentine National State shall adopt a similar position. On the basis of such circumstances, national and provincial paramount interests at stake and the mandate of article 117 CN and article 1(1) of Federal Law 48, it must be concluded that the disputes covered by the Delaware and Supreme Court Cases fall under the sole and exclusive jurisdiction of the SC and that the SC shall so decide.

56. Such end result would be in line with the principle accepted by Argentine private international law that there is federal interest triggering on its own the international jurisdiction of Argentine Federal Courts if their failure or refusal to take jurisdiction would negatively affect "Argentine international interests"[20]. There is in this case a clear international Argentine interest in excluding the possibility that legal standards established in Argentine mandatory legislation regarding environmental protection, forest management and preservation, and the carrying out of oil and gas operations be not applied or substituted for other standards, agreed or not agreed by the private parties to the dispute. There is then also in the present case an international Argentine interest to have

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[20] C.S., *Fallos*, 176:218. A. Boggiano, I Derecho Internacional Privado, 3d. Edition, Abeledo-Perrot, at 415(1991).

a dispute arising out of a legal relationship or situation essentially localized in Argentina and involving the application of Argentine *Leyes de Policía* seeking the advancement of national and provincial policies and goals of the utmost importance adjudicated by the Argentine Federal judiciary in order to ensure the proper interpretation and application of such laws and avoid any risks that would arise out of their non-application or incorrect application by any other forum. Such result would be also entirely consistent with SC invariable case law asserting the exclusive jurisdiction of Argentine federal courts whenever the Argentine national interest is at stake[21] or when the dispute involves the Argentine National State and the application, in full or in part, of Federal Laws, or of the appelate jurisdiction of the SC whenever, although the dispute is not governed by federal law, it is connected with a federal issue governed by the CN or a Federal Law[22].

57. It should also be borne in mind that in view of the existence of the Delaware Case, by deciding whether it shall take jurisdiction or not on the Supreme Court Case, the SC will be also defining and delimiting the jurisdiction of the Argentine judiciary on this case vis-à-vis the foreign courts. Such decision falls within the exclusive jurisdiction of the Federal Courts[23]—in this case the SC, the Highest Court of the Land—and for that reason, so long as such decision shall not have been taken by the SC, a foreign court, on the basis at least of general comity concerns that should not remain indifferent to the vital Argentine interests affected by this

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[21] E.g., SC, *Fallos* 282:137.

[22] G. Bidart Campos, II Tratado de Derecho Constitucional Argentino, Ediar, at 544 (1993).

[23] C.S., *Fallos* 321:48; A. Boggiano, I Derecho Internacional Privado, 3d. Edition, Abeledo-Perrot, at 414 (1991).

case, would be expected to dismiss the case based on lack of jurisdiction or at least to postpone any determination of its own jurisdiction regarding the same case until final judgment by the SC.

Date: August 29, 2003.

Horacio A. Grigera Naón

APPENDIX E

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C.A. No. 20135-NC

CANDLEWOOD TIMBER GROUP LLC and
FORESTAL SANTA BARBARA SRL,
Plaintiffs,

v.

PAN AMERICAN ENERGY LLC,
Defendant.

Deposition of SAUL LITVINOFF, Louisiana State University, Paul M. Hebert Law Center, 4022 South Ramsey Drive, Baton Rouge, Louisiana 70808, taken at the Sheraton Convention Center, 102 France Street, Baton Rouge, Louisiana, on Monday, the 11th day of August, 2003.

APPEARANCES:

BOUCHARD, MARGULES & FRIEDLANDER, PA
(BY: JOEL E. FRIEDLANDER, ESQ.)
222 DELAWARE AVENUE, SUITE 1400
WILMINGTON, DELAWARE 19801
ATTORNEYS FOR THE PLAINTIFFS

MORRIS, NICHOLS, ARSHT & TUNNELL
(BY: DAVID J. TEKLITS, ESQ.)
1201 NORTH MARKET STREET
WILMINGTON, DELAWARE 19801
ATTORNEYS FOR THE DEFENDANT

ALSO PRESENT: FRANCISCO ROMANO

REPORTED BY: PAT KENNEDY QUINTINI
CERTIFIED COURT REPORTER

* * * *

[59] Q. Have you reviewed the filings in the Argentine action?

A. Yes.

[60] Q. Have you had discussions with Mr. Friedlander regarding those?

A. Yes.

Q. What have you told Mr. Friedlander regarding the Argentine action?

A. That I thought that the plaintiff in the Argentine litigation was asking for an advisory opinion from the court.

Q. Did you say anything else?

A. Let me see. Because Mr. Friedlander also asked me about jurisdiction, and I said that the complaint filed there alleged that there was an exclusive jurisdiction of the Supreme Court of Argentina, and I expressed an opinion to the contrary.

Q. And what was the basis for your opinion to the contrary.

A. Because in this particular case I see no substantive immediate interest of either the federal or a provincial State of Argentina that could be grounds for a claim of exclusive jurisdiction, since I regard the Delaware litigation as a dispute between private parties over compensation for [61] damages.

Q. Are you aware that the Argentine Federal Government and the Province of Salta are named parties in the Argentina action?

A. I'm aware that the plaintiff in Argentine litigation has named federal and provincial states as coplaintiffs; in other words, has claimed that those two parties are either necessary or indispensable, which is a matter for the court to decide.

Q. And if the Argentine Government's a necessary party, does the Argentine Constitution provide that the exclusive jurisdiction resides in the Argentine courts?

A. If they were indispensable parties, yes.

Q. What if the Argentine Government decides they want to be parties to the litigation?

A. Then it's up to the court to decide what they have is substantial direct and immediate interest in the matter.

Q. And you are aware that the [62] Province of Salta has entered an appearance in the Argentine action?

A. Yes.

* * * *

[128] Q. In the next paragraph 7, you say that: Articles 116 and 117 of the Constitution of Argentina provide for exclusive jurisdiction of the Argentine courts, federal courts in certain specific limited instances.

What instances do those sections provide for?

A. The state is party to litigation, litigation between two different provinces, also matters of citizenship and naturalization.

Q. Anything else?

A. Not to my recollection.

Q. The Argentine Supreme Court decides that either the Argentine Federal [129] Government or the Province of Salta are proper parties to this dispute. Is it your opinion then that the dispute is properly heard in the Argentine federal courts?

MR. FRIEDLANDER: Objection.

THE WITNESS: Yes.

EXAMINATION BY MR. TEKLITS:

Q. Is it your understanding that the Argentine Supreme Court will decide that issue?

A. Will decide the issue in that sense?

Q. No, not decide the issue one way or the other, but it will decide that issue?

A. Oh, yes, I think the Supreme Court is bound by its own rules of procedure to decide the matter.

* * * *

APPENDIX F

TRADUCCIÓN PÚBLICA .....

TRANSLATION .....

On the left-handed corner there is a letterhead that reads: Ministry of Federal Planning, Public Investment and Services. Energy Secretariat. Undersecretariat of Fuels. .....

Buenos Aires, June 24th 2003 .....

NOTE SSC No 11/03 .....

PAN AMERICAN ENERGY LLC, ARGENTINA BRANCH
Av. Leandro N. Alem 1180, 6th floor .....
1001—Buenos Aires City.....

Ref 'Pan American Energy LLC, Argentina Branch vs. Forestal Santa Bárbara and others r/ declaratory action'.....

I am writing to you with reference to the aforementioned legal proceedings expedited to the Supreme Court (the 'Court'), concerning a legal action filed by the said company against FORESTAL SANTA BARBARA S.R.L. (and others), in its capacity of surface owner of 'Acambuco' hydrocarbons exploitation Area, Province of Salta, whereof PAN AMERICAN is concession co-holder and operator. .....

This legal action relates to a suit filed by FORESTAL SANTA BARBARA S.R.L. against PAN AMERICAN, in Delaware, U.S.A. ('Candlewood Timber Group LLC, et al. vs. Pan American Energy LLC, C.A. No. 20135'), due to a dispute between the companies, regarding financial implications arisen by the occupation of some lands owned by SANTA BARBARA S.R.L. in Acambuco Area. .....

In the suit brought to the Court, the National Government has been summoned as third party, pursuant to Section 94 of the Civil and Commercial Procedure Code, according to the Official Notice dated May 29th, 2003 issued by the said Court. .....

We therefore inform that, concerning the aforementioned, this Undersecretariat of Fuels has already stated its position in the administrative File processing the reply to the Court (S01:0100896/03), and we formally state that the Argentine Government is actually, specifically, definitely, and reasonably interested in the Court decision thereof. .....

In this respect, the decisions that might be taken in the suit brought in Delaware court (USA) could mean—among others—the loss, modification or cancellation of the exclusive attribution and competence of the Argentine Government and of the application of the Argentine law regarding hydrocarbons, according to the arguments set forth in the response to be submitted before the Court in due course. .....

In the case filed before the Court, and notwithstanding the financial implications to the parties thereof, the sovereignty of the Argentine Government with respect to the possible ruling by a foreign court and its possible effects on the continuity and regularity of hydrocarbon exploration, exploitation and transportation activities carried out in Argentine are at stake. .....

Sincerely yours .....

Lic. CRISTIAN A. FOLGAR, Undersecretary of Fuels Department. .....

Follows a seal that reads: .....

I do hereby certify that the signature above that reads CRISTIAN A. FOLGAR is true and belongs to an official in his capacity of Undersecretary of Fuels Department. Economy Ministry. General Office of Dispatch and Reception Desk. .....

Date: June 25th, 2003. .....

Signed by: JORGE ALBERTO DIAZ. General Office of Notification and Reception Desk. .....

This is a TRUE TRANSLATION into English of the original document in Spanish that appeared before me in Buenos Aires on the 25th day of June, 2003. .....

Es TRADUCCION FIEL al idioma Inglés del documento original en idioma Castellano que tuve a la vista y al cual me remito en la ciudad de Buenos Aires a los 25 días del mes de junio de 2003. .....

/s/ [Illegible]
Sandra Valentina

COLEGIO DE TRADUCTORES PUBLICOS
DE LA CIUDAD DE BUENOS AIRES
Corresponde a la Legalización
No. T2-15466603 [illegible]
Fabiana O. Pomilio

APPENDIX G

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C.A. No. 20135-NC

CANDLEWOOD TIMBER GROUP LLC and
FORESTAL SANTA BARBARA SRL,
Plaintiffs,

v.

PAN AMERICAN ENERGY LLC,
Defendant.

AFFIDAVIT OF ALBERTO E. GIL

Alberto E. Gil, being duly sworn, does hereby depose and say that:

1. I am the Chief Operating Officer for Pan American Energy LLC Argentine Branch ("PAE").

2. PAE is engaged in the business of exploring for, extracting and transporting hydrocarbons in the country of Argentina. PAE Energy LLC operates pursuant to concessions granted by the federal government of Argentina. Said government, along with the Provinces, is the owner of all hydrocarbons located in the country of Argentina.

3. In 1991, the Argentine Federal Government granted concessions for hydrocarbon activities in the Acambuco area of the Province of Salta under Federal Hydrocarbons Law 17,319. One such concession was for the exploration and exploitation of hydrocarbons and one for the transportation of hydrocarbons. Those concessionary rights are now

held by a joint venture of natural gas companies known as Pan American Energy LLC Apco Argentina, Inc.—Northwest Argentina Corporation—YPF S.A.-O&G Developments Ltd.—("Acambuco") Union Transitoria de Empress (UTE). All members of UTE are Argentine companies or Argentine branches of foreign entities. PAE is a member of and serves as the Operator of the UTE joint venture. The Joint Venture was formed in 1994.

4. As the Operator, PAE, or its predecessor, has been conducting oil and gas exploration in the Acambuco concessions since 1979.

5. On August 2, 1999, FSB, PAE and a former landowner entered into an agreement, whereby the former landowner and FSB distributed between themselves certain indemnification payments for the period up to August, 2003. The agreement is subject to the exclusive jurisdiction of the courts of Argentina. A copy of the agreement is attached hereto as Exhibit 1.

6. In 1999, PAE contacted Forestal Santa Barbara S.R.L. ("FSB") regarding PAE's intention to conduct seismic operations on land owned by FSB. Seismic operations necessarily include land clearing, road construction, and the building of temporary camps. In response, on May 5, 1999, FSB issued a Right of Way Permit in favor of PAE for the purpose of verifying future road traces on plot 4340. FSB's permit dated May 5, 1999, is attached hereto as Exhibit 2. On May 7, 1999, FSB issued another Right of Way Permit in favor of PAE for the purpose of conducting seismic activities on plots 4335, and 4337-4340. FSB's permit dated May 7, 1999, is attached hereto as Exhibit 3.

7. In exchange, FSB demanded an indemnification payment for all damages caused by PAE while it was operating on FSB's property.

8. On December 1, 1999, FSB provided PAE with a report outlining alleged damages caused by PAE while it was operating on plots 4337-4340, 4345-4346, and 27283. The report provides a detailed description of Argentine laws applicable to forestry, oil and gas activities, and the environment. FSB's report is attached hereto as Exhibit 4.

9. In response, PAE forwarded to FSB a payment for compensation for all damages caused by PAE's seismic activities in plots 4337-4340, 4345-4346, and 27283 of FSB's property. In June, 2000, FSB signed an indemnification receipt agreeing that PAE's payment constituted "sole, complete and final indemnification for the total amount of damages . . . actual damages, and use of land . . . that were caused or could have been caused by the seismic activities" carried on by PAE in plots 4337-4340, 4345-4346, and 27283. In the receipt, FSB expressly waived any claim, whether administrative, judicial or non-judicial, present or future, against PAE. Further, FSB specifically agreed to refer any disagreement related to the Receipt Of Indemnification Payment to the Courts of Argentina and expressly waived any other court or jurisdiction. A copy of the receipt of Indemnification Payment dated June 6, 2000 is attached hereto as Exhibit 5.

10. PAE later forwarded an additional payment to FSB, for damages allegedly caused by PAE's seismic activities on plots 4337-4340, 4345-4346, and 27283 of FSB's property between May and November, 1999. On August 10, 2000, FSB signed and forwarded a Receipt of Indemnification Payment in which it acknowledged that it had received from PAE

complete and final payment for any damages caused by PAE's activities. In the receipt, FSB expressly waived any claim whether administrative, judicial or out of Court, present or future against PAE. Further, FSB specifically agreed to refer any disagreement related to the Receipt of Indemnification Payment to the courts of Argentina and expressly waived any other Court or jurisdiction. A copy of the Receipt dated August 10, 2000 is attached hereto as Exhibit 6.

11. On October 18, 2000, FSB granted to PAE an Access Permit for the purpose of entering and staying on FSB's land while planning and building roads for access to PAE's oil and gas wells. A copy of the Access Permit dated October 18, 2000 is attached hereto as Exhibit 7.

12. On August 13, 2001, PAE sent to FSB a certified letter notifying FSB of the commencement of seismic operations on FSB's land. In the letter, PAE described the roads to be built, the temporary camps to be established and the location of the surface of the forest that would be affected. PAE offered to compensate FSB for any damages caused in accordance with Argentine decree 860/96. A copy of the certified letter dated August 13, 2001 is attached hereto as Exhibit 8.

13. On August 29, 2001, FSB authorized PAE to enter its land to conduct seismic operations. A copy of the agreement is attached hereto as Exhibit 9.

14. In October, 2001, George Brooking, attorney-in-fact for FSB, signed and forwarded a Receipt of Indemnification Payment, acknowledging receipt from PAE of complete and final indemnification for all damages and for all control and surveillance expenses caused by the seismic operations. The Receipt included an express waiver of any

administrative, judicial or non-judicial claims, present or future, against PAE. In addition, FSB agreed to refer any disagreement related to the Receipt to the courts of Argentina and expressly waived any other Court or jurisdiction. A copy of the Receipt of Indemnification Payment dated October 23, 2001 is attached hereto as Exhibit 10.

15. On January 7, 2002, FSB's Mr. Schmidt sent an email to PAE's Mr. Gil proposing that PAE agree to invest in a joint venture with FSB and contribute between $10mm and $22mm, depending upon the nature of the investment. A copy of FSB's January, 7, 2002 letter seeking an investment is attached hereto as Exhibit 11. On the same date, FSB sent a Certified Letter to PAE claiming a right to fifty million Argentine pesos (AR$50,000,000) for damages supposedly caused by PAE's operations, including use of soils and water, cutting of trees, control and surveillance and installations. A copy of FSB's January 7, 2002 letter demanding compensation is attached hereto as Exhibit 12.

16. On January 10, 2002, PAE sent a letter to FSB rejecting FSB's claims to damages. PAE's January 10, 2002 letter is attached hereto as Exhibit 13.

17. On January 25, 2002, in connection with the proposed joint venture, FSB's attorney faxed PAE a draft Confidentiality Agreement, which specifically includes provisions mandating that Argentine law applies and that disputing parties must submit to ICC Arbitration in Buenos Aires, Argentina, and that enforcement of the award is subject to the exclusive jurisdiction of Buenos Aires courts. FSB's draft Confidentiality Agreement is attached hereto as Exhibit 14.

18. On March 8, 2002, FSB informed PAE that FSB would prefer to pursue the joint venture proposal with PAE rather than their "substantial damage claim." FSB's March 8, 2002 letter is attached hereto as Exhibit 15.

19. On March 15, 2002, PAE informed FSB that the only compensation to which it is entitled are the monthly payments PAE makes in return for access to FSB's property. PAE's March 15, 2002 letter is attached hereto as Exhibit 16.

20. On May 15, 2002, FSB wrote to PAE acknowledging that the compensation for the alleged damages to FSB's property caused by PAE is regulated by Section 100 of Law 17,319. FSB's May 15, 2002 letter is attached hereto as Exhibit 17.

/s/ Alberto E. Gil
ALBERTO E. GIL

Sworn to and subscribed before me
This 20th day of June, 2003

/s/ [illegible]
Notary Public

APPENDIX H

Embassy
of the
Argentine Republic

To the
Department of State
Office of the Legal Adviser
Washington. D.C.

The Embassy of the Argentine Republic presents its compliments to the *Department of State—Office of the Legal Adviser*—and wishes to refer to legal actions initiated in January 2003 by the Argentine company Forestal Santa Barbara S.R.L. and its controlling company, Candlewood Timber Group LLC, before the Court of Chancery of the State of Delaware against Pan American Energy LLC, incorporated in accordance with the laws of the state of Delaware, a company which was granted a concession to exploit and transport hydrocarbons (as per Argentine Executive Power Decrees Numbers 2175/91 and 919/95) in the area known as "Acambuco" in the Province of Salta, in the case captioned Candlewood Timber Group LLC, et al vs. Pan American Energy LLC, CA. No. 20135.

The Delaware court has set the date of June 26, 2003 for the hearing, in order to receive testimony from both parties and decide on a request by the plaintiff to stop Pan American Energy LLC from continuing with the legal proceedings initiated in Argentina.

In this regard, the Argentine government points out that it is of its utmost interest that legal questions arising within the framework of the Ley de Hidrocarburos (Hydrocarbon Law) No. 17,319 of the Mining Code and environmental legislation, between the licensees of hydrocarbon and the owners of the surface realty be dealt with in conformity with Argentine law and before the Courts of the Argentine Republic.

On this matter, Pan American Energy LLC, Argentine Branch, has initiated a declarative action before the Argentine Supreme Court in order to obtain a statement of legal certainty from the Court in the sense that such disputes must be resolved exclusively in Argentine courts. In these proceedings, it was the opinion of the Attorney General of the Nation that Argentine jurisdiction is absolute and exclusive to decide on any claims in this regard and that the Supreme Court of Justice of the Nation has jurisdiction to decide on these questions in first instance.

It is also emphasized that the Argentine government is concerned as to the fact that foreign courts may hear in this type of questions.

The Argentine government will greatly appreciate that the foregoing is transmitted to the corresponding judicial authorities in the state of Delaware.

The Embassy of the Argentine Republic avails itself of this opportunity to renew to the *Department of State—Office of the Legal Adviser*—the assurances of its highest consideration.

Washington, D.C., June 19, 2003

/s/ [Illegible]

APPENDIX I

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C.A. No. 20135-NC

CANDLEWOOD TIMBER GROUP LLC and
FORESTAL SANTA BARBARA SRL,
Plaintiffs,

v.

PAN AMERICAN ENERGY LLC,
Defendant.

AFFIDAVIT OF EDMUNDO F. CATALANO

1. *Introduction.*

Edmundo F. Catalano, being duly sworn, hereby deposes and says:

I am a native of Argentina. I received a LL. B. degree from the University of Buenos Aires in 1939 and a J.D. degree in Comparative Jurisprudence from the same University in 1943. I was professor of Mining and Hydrocarbon Law at the Law College of the University of Buenos Aires until 1980. Currently I taught Mining and Natural Resources Law at the Salvador University in the city of Buenos Aires. I acted as chairman in the Reform Committee of the Mining Code in 1974 and 1983. I also was designated by the National government to draft the modernization of the Mining Code in 1996. A copy of my resume is attached hereto as Exhibit A.

This affidavit is intended to issue a legal opinion on the Argentine law applicable to the case brought by CANDLEWOOD TIMBER GROUP LLC *et al.* v. PAN AMERICAN

ENERGY LLC, in the Court of Chancery in the State of Delaware, United States of America and other related matters.

PAN AMERICAN ENERGY LLC, Argentina Branch ("PAE") together with other entities obtained two concessions from the Argentine Federal Government issued in 1991, one for the exploration and exploitation and another for the transportation of hydrocarbons, under Federal Hydrocarbons Law 17,319, in connection with the so-called Acambuco Area, located in the Province of Salta.

PAE conducts operations in the above area as a joint venturer, together with other oil companies, with PAE acting as the field operator.

2. *Federal Regulation Governing the Hydrocarbon Industry.*

Argentina is a federal country. The oil and gas industry is governed mainly by the provisions of the National Constitution, Federal Hydrocarbons Laws 17,319 and 24,145 and the regulations thereto and, additionally, by the Federal Mining Code and other laws and regulations.

According to Section 124 of the National Constitution, the Provinces (or the Nation, as the case may be) have eminent domain over the natural resources, which include oil and gas fields, in their respective territories.

Federal Hydrocarbons Law 17,319, passed by the National Congress by virtue of the powers conferred upon it by section 75, paragraph 12 of the National Constitution, together with Law 24,145, also Federal, contain the legal provisions governing the ownership and exploitation of hydrocarbons.

These statutes and their regulations constitute a complete legal body on the matter and are applied and enforced throughout the country. It contains (i) the general principles which guide the hydrocarbons policy in the country, the formulation of which is exclusively under the jurisdiction of the Federal Government; (ii) the rights and obligations of the

Federal or Provincial Government associated with these resources, and the rights to be granted to private entities; (iii) relationships between hydrocarbon titleholders and surface owners or landowners; and (iv) the legal procedures regarding the acquisition, conservation and forfeiture of the rights on hydrocarbons granted to private entities.

In addition to the above-mentioned regulations, the Federal and the Provincial Governments have organized bodies, both administrative and judicial, which have jurisdiction on the matter. They guarantee the proper control of hydrocarbons activities in the country and the compliance with legal duties and obligations. These bodies also assure that the rights conferred to private entities directly and indirectly regarding this activity are duly protected.

3. *Eminent Domain over Hydrocarbon Resources.*

As mentioned above, the Federal Government and the Provinces—under the Constitution and the aforementioned laws—have the eminent domain over the hydrocarbon resources located in their respective territories. This means that the Argentine government owns all hydrocarbon fields located in Argentina and possesses the exclusive right to grant permission, in the form of concessions, to private entities to explore, exploit, and transport hydrocarbons.

Government ownership of this type of asset has historical roots tracing far back to the earliest Spanish-American mining law. In the case of oil and gas, such power is reinforced by the inalienable and imprescriptible nature of the source of mineral resources. The Spanish-American ownership system strongly differs in this respect—and this must be taken into account—from the Anglo-Saxon system which grants ownership of the energy resource to the owner of the land.

Within the Argentine legal system, no negotiation is permitted which may affect the hydrocarbons field without the

consent of the Government (its original owner). Since the field may not be disposed of, the Government (federal or provincial) has only the authority to grant private entities rights of exploitation, but may never dispose of property rights. This reserve of legal ownership is valid and may not be affected by acts of third parties or of another authority, irrespective of its origin. Therefore, no agreement between private entities may alter or modify this legal regime.

This public law principle is established by Law 17,319, which in order to maintain management unity, confers exclusively upon the Federal Government the responsibility for setting the national policy pertaining to the oil and gas industry throughout the country. This authority of the Federal Government, based on reasons of national interest, may not be delegated to provincial governments. Such authority implies strict control of the activities related to hydrocarbons, which strengthens the public law nature of the hydrocarbon legislation.

4. *Rights of Private Entities in the Exploration and Exploitation of Hydrocarbons.*

Private entities may be eligible for the exploration and exploitation of hydrocarbons, through public bids called for by the Government, by temporary exploration permits and exploitation concessions. The Government is also empowered to grant concessions for transportation of oil and gas.

Permit holders and concessionaires are bound both to perform works pursuant to technical guidelines, by using state-of-the art, rational and efficient methods and to adopt measures necessary to avoid or minimize damage to agricultural, fishing and communications facilities, and to aquifers they may find during drilling.

The enforcement authority is the Federal Secretary of Energy, which supervises the work in coordination, in some cases, with the respective provincial agencies.

Moreover, the exploitation concessionaires must pay the Government a 12% royalty or contribution in-kind or on the liquid proceeds of hydrocarbons at wellhead, which the Government may reduce to 5%, taking into account productivity, conditions and location of the wells. The royalty is received in full by the respective provincial government, that owns the relevant resource.

5. *Public Use Nature of the Hydrocarbons Activity. Subordination of the Rights of the owner of the Land.*

The oil and gas industry is protected by the public use privilege by virtue of which all surface activities (including, without limitation, forestry projects) carried out within or outside the perimeter of the concession or the permit, are subordinated to the needs of the hydrocarbons activities, subject to payment of just compensation. This power is broad in order to ensure that, despite the circumstances, the hydrocarbons activity may be carried out without delay or hindrance on the surface. If there is any conflict, the public use privilege enjoyed by the hydrocarbon exploration and exploitation activity always prevails.

This privilege is evidenced by:

a) The right of the hydrocarbons permit holder and the concessionaire to establish easements, to the necessary extent, on the surface land affected by the concession, so as to perform any work or another operation required for the development of their activities.

b) The ability of the exploitation concessionaire to compel the owner to sell the surface land located within or outside the field.

Both rights imply the full subordination of the rights of the surface owner to the needs of the hydrocarbons industry. Regarding this matter, Law 17,319, Section 66, sets forth that

the opposition of the landowner to the occupancy of the land or the lack of agreement with respect to the amount of the compensation set by the Government, shall under no circumstances be reason enough to suspend or prevent the authorized hydrocarbons-related work, provided the concessionaire demonstrates sufficient guarantees to pay damages.

Regarding this matter, by virtue of section 66 of Law 17,319, the Undersecretary of Fuels, reporting to the Secretary of Energy, has recently granted in favor of PAE a right of way and occupation easement despite the previous opposition of the surface owner (Forestal Santa Barbara S.R.L., a Candlewood Timber Group LLC subsidiary).

In turn, section 100 of the same law provides that those parties affected by hydrocarbons activities may either file a judicial complaint seeking compensation for any damage or accept the amounts fixed by the Federal Government for each area of the country, in this latter case without any further evidence.

The law, while imposing upon the surface owners this limit to their rights, at the same time entitles them to use the above-mentioned legal mechanism to secure their private interests, and receive proper compensation through appropriate procedures.

6. *The Provisions which Govern Hydrocarbon Exploration and Exploitation Constitute a Comprehensive and All-Embracing System.*

There are—as mentioned—sufficient provisions in Argentine hydrocarbon laws to ensure compliance by the permit holders and concessionaires with the legal provisions set forth, both with respect to the Government, and in connection with the landowners and third parties for any damage or loss that may be caused by hydrocarbons activities.

There are also administrative and judicial mechanisms available to protect private rights, supervise compliance with statutory obligations and resolve complaints that may be filed by the affected persons.

There are no legal or institutional loopholes in the applicable regulations which prevent title holders or concessionaires, as well as landowners, from freely exercising their rights by resorting to the jurisdictional means set forth in Argentine legislation. Such jurisdiction is proper and sufficient to settle any kind of dispute that may be brought against the Government or by private entities against each other.

I have reviewed plaintiffs' original and First Amended complaints filed in this action, which both sought injunctive relief, and that relief would necessitate the involvement of the Province of Salta and the National Government of Argentina as it seeks relief as to their interests, and would be under the exclusive jurisdiction of the Supreme Court of Argentina. As the Province of Salta has the eminent domain over the hydrocarbon resources, any ruling concerning the manner in which oil and gas operations are conducted would affect the extension of this power. Such ruling would also undermine the authority of the federal government, which has exclusive power to decide on matters associated with the national policy on hydrocarbons.

I have also reviewed Pan American's Petition before Argentina's Supreme Court, which comports with my opinion in this matter.

In giving this opinion I have also reviewed the Affidavit of Dr. Litvinoff, plaintiffs' expert. Dr Litvinoff does not claim in his affidavit to have any expertise regarding law related to the mining of hydrocarbons, environmental protection or forestry. His statements do not even attempt to analyze the complex laws and regulations the Nation of Argentina and the Prov-

ince of Salta have on these subject matters. Moreover, Dr. Litvinoff's cursory review of Argentina's extensive environmental and mining laws and regulations in paragraph 8, 12 and 14 of his affidavit are inaccurate. Surface owners who have grievances with concessionaires, over damage caused to the surface owner's property, must seek redress through the regulatory bodies organized under the laws of the Nation of Argentina or the Argentine courts. Foreign courts would not be able to understand the complex laws and regulations enacted by the federal government and the Province of Salta, which take into account the different public interest associated with mining, oil and gas, forestry and environmental protection.

In fact, it is clear that Dr. Litvinoff agrees with this assessment as he acknowledges in pargraph 7 of his affidavit, that the Constitution of Argentina does provide for the exclusive jurisdiction of the Argentine federal courts in instances where the nation of Argentina or one of its provinces (states) are involved as a party litigant. That is why, to reach his conclusion that Argentine courts are not competent, Dr. Litvinoff mistakenly opined in paragraph 10 of his affidavit that neither the Argentine State, nor the Province of Salta, has an interest in this action merely because this litigation will not affect title to minerals. On the contrary, monetary damages assessed against an Argentinian concessionaire potentially has grave economic and public policy consequences for both the Nation of Argentina and the Province of Salta. The type of damage and at what extent it should be redressed could affect the national hydrocarbon policy since it may result in a non feasible exploitation.

Even if injunctive relief is not requested, as in Plaintiffs' Second Amended Complaint, which also I have reviewed, given the complexity of the regulation of those activities by the Argentina National and Provincial governments, it would run counter to Argentinian Law, National interests and policy,

for courts of foreign jurisdiction to be regulate those activities that are exclusive to the Sovereign State of Argentina pursuant to Argentinian law.

Given the public nature of the rules and the public policy involved, the Argentine Government is present and is a necessary party to any controversy that may arise and affect oil and gas exploration and/or exploitation in accordance with what is explained in paragraph 3 and 5 above.

This understanding has been recently (May 19, 2003) confirmed by the mandatory opinion of the Attorney General of Argentina acting before the Supreme Court in the above mention case filed by Pan American.

Furthermore, according to Argentine rules of civil procedure (i.e. Section 517 of Federal Code of Civil Procedures) jurisdiction to decide cases where public interest is affected, is exclusive to Argentine courts. Therefore foreign judgements would not be enforceable in Argentina if they are deemed to affect public policy principles set forth in Argentine law. In addition, Argentine legislation provides for exclusive mechanisms to deal with violations of environmental or mining laws, which could not be substituted by any foreign procedure, due to the fact that such mechanisms imply the exercise of the national sovereignty

7. *Forestry Legislation.*

Argentina has a comprehensive set of regulations for the protection of forestry projects, which has at present constitutional status pursuant to Section 41 of the National Constitution (see paragraph 8.1 below).

7.1. *Federal Legislation.*

7.1.1 *Forestry Promotion, No.13,273*

This law, passed on October 6, 1948, is applicable to all fiscal forests, private forestland in provinces that have adopted this act and relevant forests as regards national

welfare. Its purpose is the defense, improvement and extension of forest growth throughout the country. Law No. 13,273 was updated in 1995 by Decree 710, which regulates native forest maintenance and increase and replacement of non-useful species by others with better use, forestation and reforestation deregulation in implanted woods; preservation of those rules related to forest systems, fire prevention, penalties, and enforcement provisions. The law also provides for a procedure of revision in light of technological advances and environmental requirements. The Province of Salta adopted these federal rules by Law No. 5,242.

7.1.2. *Law for investment on cultivated forests. No. 25.080*

This law, passed on January 15, 1995, establishes a regime to promote investment in new forestry projects and in the expansion of existing woodlands. The relevant authority will issue a certificate with the taxes, contributions and rates to be applied to each project. This regime is regulated in the Province of Salta by Law No. 7,025.

7.1.3. *Tax Stability Law No. 24,857*

This law, passed in 1997 grants 33 year tax stability to the plantation and management of native and cultivated forests, as well as their crop and commercialization. Such stability applies exclusively to owners of companies which develop the mentioned activities.

7.2. *Province of Salta Legislation*

The general environmental law of the Province of Salta, No. 7,070 (see paragraph 8.5.1 below) establishes the general frame for the protection of the environment, including forestry. Local regulations protect forestry, taking into account its regional characteristics and unique biodiversity of the province.

The province of Salta has several forestry regulations. The most relevant are the following: (i) Law No 6,635, which provides for forestry promotion, regulating the use, production and exploitation of forestry activities and projects and (ii) Law No 7,107, which creates the Provincial System of Protected Areas in order to develop and execute processes directed to achieve a sustainable management of natural resources of the Province, in accordance with Section 98 of the General Environmental Law of the Province of Salta.

I have seen no evidence of Forestal Santa Barbara S.R.L. seeking any approval or special regime for its alleged forestry project in the Province of Salta.

8. *Environmental Rules Governing Hydrocarbons Activity.*

8.1. *The National Constitution.*

An amendment to the Constitution, approved in August 1994, incorporates the right of all inhabitants to enjoy a healthy, balanced and suitable environment for human development and includes a provision on the duty to preserve such an environment. (Section 41 of the Argentine Constitution).

The amendment also incorporates the concept of sustainable development, requiring that productive activities must satisfy current needs without affecting the needs of future generations. (*Id.*)

In order to resolve jurisdictional conflicts on environmental matters due to the federal system discussed above, section 41 of the National Constitution vests the Federal Government with the power to enact rules setting forth minimum environmental standards. It is then the duty of the Provinces to enact rules supplementary to such federal standards.

In addition, the National Congress has the constitutional authority to regulate environmental matters when such matters affect Argentine coastal waters and territories reserved to the National Government, to ratify and approve international

treaties addressing environmental issues and to regulate inter-provincial and international trade and the free navigation of national rivers.

The Constitution, as amended, enforces a duty immediately to clean up any damage caused to the environment, and restore the environment to its prior condition. This clearly includes the obligation to restore sites that have been contaminated. Thus, Argentina's Constitution incorporates the "polluters pay" principle, one of the cornerstone principles of environmental law. The remediation duty has been recently implemented by Law 25,675 passed by the National Congress (see paragraph 8.2., below).

Under section 43 of the National Constitution, any person may apply for an injunction *(amparo)* against any act or omission caused by the government or by individuals who may actually and imminently damage, restrict, alter or threaten, in an arbitrary or illegal manner, the rights and guarantees recognized by the Constitution, an international treaty or a local law.

Whenever a claim to protect the environment arises, either the Ombudsman (*Defensor del Pueblo*), NGOs or the aggrieved party is entitled to file the above-mentioned petition. According to section 43 of the National Constitution non-governmental organizations may file an injunction when they are enrolled with the competent authority as a private entity devoted to the protection of the environment. According to Section 86 of the National Constitution, the Ombudsman is an independent official appointed by the National Congress, who enjoys the same immunities and privileges as congressmen. His function is to defend in courts rights and guarantees of the Argentine inhabitants granted by the National Constitution. An "aggrieved party" may be anyone who is able to establish a link between the right infringed and the action or omission causing environmental damage.

8.2. *The General Environmental Law No. 25,675.*

This law, passed on November 6, 2002, sets forth a comprehensive system of environmental protection. The law is applicable throughout the entire country because it is a rule of minimum standards pursuant to the provisions of section 41 of the National Constitution (see paragraph 7.1., above). It provides for the principles of environmental policy and establishes the obligation to conduct a prior environmental impact evaluation procedure for any work or activity capable of degrading the environment, or affecting the life quality of the population.

Furthermore, the law establishes the obligation to repair any environmental damage with a harsh system of strict liability (see paragraph 9.1., below). It also provides for a clear judicial protection mechanism to protect the environment, by granting a broad procedural representation to the aggrieved party, the Ombudsman and the non-governmental organization to require those parties liable for any environmental damage to carry out remedial measures.

In addition, the law ratifies the agreements entered into between the Federal Government and the Provincial Governments for the coordinated implementation of the national environmental policy.

8.3. *Environmental Regulations Governing the Hydrocarbon Industry.*

The Argentine Federal Government, in addition to the general environmental rules, has adopted a series of specific environmental regulations which govern hydrocarbon exploration and exploitation activities.

These regulations have been enacted taking into special account the environmental impact that this activity causes and the characteristics inherent in the oil and gas industry in Argentina.

Section 69 of Law 17,319 sets forth the principle that this activity must not damage agriculture, fishing, communications or aquifers. This section also sets forth the liability of the concessionaire for any damage caused to the surface owner. This provision does not mean that any interested party in such activities could interfere or prevent the performance of hydrocarbons activities, which in any case will prevail.

Since 1992, the Federal Government, through the Secretary of Energy, has adopted a set of rules regarding environmental protection related to the hydrocarbons activity. The following are the most relevant provisions: (i) Resolution No. 105/92, enacted on November 11, 1992, which sets forth the guidelines and procedures for environmental protection during the exploration and exploitation of hydrocarbons, by requiring the preparation and submission of Environmental Impact Studies before beginning work; (ii) Resolution No. 252/93, which sets forth the requirements to be contained in the Environmental Impact Studies; (iii) Resolution No. 341/93, which provides for the schedule and rules to recondition pools and restore soil damage; (iv) Resolution No. 342/93 which provides the structure of contingency plans, which must be submitted jointly with the Environmental Impact Studies; (v) Resolution No. 143/99, which forbids gas venting; and (vi) Resolution No. 5/95, which regulates Title VII of Executive Order 3,3589/33 relating to procedures for well abandonment.

8.4. *Other Federal Rules on Environment.*

In addition to the specific environmental rules which govern the hydrocarbons activity, there are other rules which apply to the oil industry. Among them, the most important ones are mentioned below.

8.4.1. *Federal Hazardous Waste Law No. 24,051.*

This law, passed on December 17, 1991, regulates the generation, transportation, management and disposal of haz-

ardous waste, establishing a "cradle to grave" management liability system. The law is regulated by Decree No. 831/93, enacted on April 23, 1993, and in some circumstances it is applied to the hydrocarbons activities, specifically in the case of oil contamination. It also provides for a criminal liability system in case of incidents involving hazardous waste.

8.4.2. *Federal Industrial Waste Law No. 25,612.*

This law, passed on July 25, 2002, sets forth the minimums standards on environmental protection for the management of industrially-originated waste and service activities generated in the whole country. It provides for a strict liability system for damage caused to third parties by this type of waste, and for a system of administrative penalties in case of violation of the law. Though this law has not been implemented yet, upon regulation it will substitute Law 24,051.

8.4.3. *Federal Environmental Law for Mining Activity, No. 25,585.*

This law, passed on November 1, 1995, sets forth the environmental protection rules applicable to the mining industry. Though it does not directly include the hydrocarbons activity, it may be applied by the judges in some cases as it is a related activity and as it regulates the remediation actions in case any environmental damage is caused. Due to the existence of overlapping legislation on the matter, a court may apply the above mentioned law to decide a case.

8.5. *Province of Salta's Environmental Legislation.*

The Province of Salta, where the Acambuco Area is located, has several environmental protection rules, to which hydrocarbons activities are subject. The most relevant applicable regulations are discussed below.

8.5.1. *The General Environmental Law of the Province of Salta, No. 7,070.*

This law, passed on December 21, 1999, is regulated by Decree 3097. A decree regulating a law is issued by the Executive Branch in order to establish detailed norms under the frame given by a law. The law provides for a comprehensive system of environmental protection, and establishes a procedure of approval and evaluation of environmental impact studies, which includes the drilling of wells and production of oil and gas. It also regulates in detail aspects with regard to the prevention and control of contamination of water, flora and fauna, the atmosphere, the soil, its use and conservation and natural landscapes and their protection.

This law provides for a system of jurisdictional defense of the environment by granting broad procedural means to file complaints before the provincial judges. It also provides for a system of administrative penalties in case of violations of the law.

8.5.2. *Provincial Hydrocarbons Law No. 6,747.*

Law No. 6,747, passed on August 11, 1994, sets forth the control system for the production, storage, transportation, industrialization and sale of hydrocarbons in the Province of Salta. This law is regulated by Decree No. 3,560/95, which sets forth the rules of environmental protection for hydrocarbons exploration and exploitation.

8.5.3. *Other Environmental Laws.*

The Province of Salta has other environmental protection laws, such as Law No. 5,973, which has adopted the Federal system of Law No. 22,428, regarding conservation and use of soil, and Law No. 6,649 on preservation of archeological, paleontologic, artistic and historical artifacts.

9. *Enforcement Authorities. The Administrative System Of Penalties.*

In Argentina, environmental legislation regulating hydrocarbons activity provide for Federal and Provincial administrative bodies, with authority to enforce hydrocarbon and enwironmental regulations. For the same purpose, these rules include strict procedures for penalties in case of noncompliance and violations. The most relevant enforcement authorities are mentioned below.

9.1. *The Federal Secretary of Energy.*

The Federal Secretary of Energy, under the control of the Miinistry of Economy, is the authority entrusted with inspecting and supervising hydrocarbons activities, through the National Department of Hydrocarbons Resources and Fuels. Joiintly with the pertinent provincial bodies, it oversees the performance of hydrocarbons activities to ensure the compliiance with the applicable regulations, regarding technical guiidelines in the performance of work, calculation and payment of royalties to the Government and environmental protection.

Failure to fulfill applicable obligations may result in the forfeiture of the concession. Minor infringements are penalized with warnings, suspensions or removal from the register of bidders, or with fines according to the seriousness of the case.

The Secretary of Environment and Sustainable Development, under the control of the Ministry of Social Development, is the enforcement authority of the Hazardous Waste Law No. 24,051, and may impose fines depending on the natture of the violation and the damage caused.

9.2. *The Environmental Authority in the Province of Salta.*

As far as hydrocarbons are concerned, the enforcement authority is the Secretary of Mining, Industry and Energetic Resources. This Secretary must safeguard the preservation of the environment, by avoiding any risk of contamination and deterioration caused by the sale, industrialization, and exploration of hydrocarbons.

The Secretary of the Environment and Sustainable Development is the enforcement authority for the protection of the environment-Law No. 7,070, and its regulatory Decree No. 3,097. This Secretary supervises and controls the compliance with the law, and may enter into agreements with national, provincial and municipal bodies.

10. *The Judicial System of Claims.*

Argentine law, both federal and provincial, provides for a wide variety of procedural instruments to claim against any kind of damage to property and other constitutional rights, including environmentally-related ones. The affected party may sue responsible parties seeking judicial orders and injunctions to either cease or redress damage. The damaged party is also entitled to claim for remediation of environmental damage through a constitutional protection remedy (see paragraph 7.1., above).

Furthermore, the rules of civil law provide, for the sake of protecting the victims of damage, a series of provisions which govern the liability to third parties.

10.1. *Liability Under the Civil Code.*

Under Argentine law, the general rules of liability for damages are governed by the Federal Civil Code, which applies throughout the country. This Code provides a differentiated liability system, depending on whether damage is caused by individuals or by things.

The first case is liability for negligence in which event the subjective element of the action or omission of the responsible party must be proved (willful misconduct, imprudence or negligence). It is set forth in section 1,109 of the Civil Code.

In the second case, as it is damage caused by the risk or defect of goods, the negligence of the owner or guardian of the good is presumed, and liability may only be disclaimed by evidencing the negligence of the victim or of a third party. This strict liability is set forth in section 1,113 of the Civil Code, which provides a shift of the burden of proof.

Damage caused by solid, liquid and/or gaseous pollutants, as well as those generated as result of industrial activity, are deemed in courts as damage caused by goods. The mere verification of the existence of damage and the cause/effect relationship between the action of the good or the activity and the damaging event is sufficient to prove liability. The owner or guardian of the pollutants or contaminating activity must indemnify the aggrieved party. The owner or guardian may only disclaim liability by demonstrating that the damage has been caused as result of the negligence of the victim or of a third party.

10.2. *Stringent Liabilities resulting from Environmental Legislation.*

Section 29 of the General Environmental Law (Law No. 25,675) provides for a stricter liability than the one contemplated in Section 1,113 of the Civil Code. To disclaim liability, the owner or guardian of the goods or activity must prove not only the negligence of the victim or of a third party, but also that he has acted with due care by adopting all measures intended to avoid damage.

The Industrial Waste Law (Law No. 25,612) also contains a system of strict liability, whereby the generator may disclaim liability by proving the negligence of a third party, provided the action could be avoided with the use of due care.

Furthermore, the generator may not limit his liability for damage caused by his wastes, even when such wastes have been delivered for treatment or to final disposal plants. The generator may disclaim liability when damage is caused by the increased risk that a waste acquires as result of inadequate or defective disposal or treatment and when the waste is used as an input of another productive process.

10.3. *Judicial Proceeding.*

Access to the judicial system in the case of environmental matters is wide, and is not subject to any kind of procedural restrictions. The judge may order all necessary measures to conduct or prove the damaging events in the proceedings.

In proceedings involving environmental matters, the courts have, before deciding on the merit of the case, full powers to order preliminary or provisional remedies, which consist of orders requiring the discontinuation or alleviation of the effects of damage. These broad powers to adopt provisional remedies are set forth in section 32 of the General Environmental Law, establishing that at any stage of the proceedings, precautionary measures may be requested and enforced *ex parte*. It also contemplates that the judge may order such measures independently.

Judgments rendered in these proceedings do not provide only for compensation of damage suffered by individuals or the assets of aggrieved parties, but they also order the cessation of contamination, abatement measures, and remediation actions. Such remediation actions may consist of the reinstatement, as far as possible, to the situation prior to the contaminating or degrading action. For these measures to be effective, the judgments may include *astreintes*, which consist of progressive and cumulative fines until the condemned party complies with the judicial order.

10.4. *The Nature of Public Policy of the Hydrocarbons and Environmental Legislation.*

Taking into account that the provisions governing the hydrocarbons activity are based on the eminent domain of fields by the Government, oil and gas exploitation prevails over the rights of the surface owners. This gives hydrocarbons exploration and exploitation the nature of public use, and therefore its rules are "public policy" for purposes of determining the exclusive jurisdiction of Argentine courts to construe and apply them.

It must be clarified that public policy rules cannot be ignored or set aside by agreements between private entities.

Public policy also comprises the environmental protection rules in force in Argentina. In this sense, section 3 of the General Environmental Law (Law No. 25,675) sets forth that it is applicable in the whole country, with its provisions being public policy. Following this criterion, Law No. 7,070 of the Province of Salta declares as provincial public policy all actions, activities, programs and projects intended to preserve, protect, defend, improve and reinstate the environment, biodiversity, genetic inheritance and natural resources.

10.5. *The Exclusive Jurisdiction of Argentine Courts as regards Environmental Matters related to Hydrocarbon Fields.*

There is no doubt, then, that the balance between the rules governing the hydrocarbons activity and its relationships with the surface owner, as well as the relationship between that activity and environmental protection, are matters specially sensitive to the Argentine legal system. The relevance of these rules is such that it involves the very exercise of the sovereignty of the Argentine Republic, the autonomy of the Provinces and the governmental ownership of fields.

Because the rules discussed above take into account the peculiarities of the Argentine environmental situation and of the Province of Salta, a normative system of unique characteristics is applicable. That is to say, they present a comprehensive system which protects the interests of the Federal Government and of the Provinces, of the concessionaire, of the landowner and of the community.

To safeguard the effectiveness of the normative system in force, Argentine law has organized governmental bodies having specific jurisdiction to supervise its fulfillment, by granting also the interested parties the proper judicial tools to ensure such observance.

Moreover, it is vitally important to the Nation of Argentina that it be able to regulate all aspects of the hydrocarbon industry and forestry industry, including the relations between the two industries and environmental related issues. It would be totally repellant to Argentine national policy to have such regulation issue out of the courts of a foreign country. Indeed, the courts of Argentina may not enforce any decree of a non-Argentine court or other entity respecting the regulation of hydrocarbon or forestry activities inside the country of Argentina.

Therefore, under Argentine law, with respect to any conflict regarding the issues which govern the legislation mentioned above, the jurisdiction of Argentine judges is exclusive.

Date: June 18th, 2003 /s/ [Illegible]
Edmundo F. Catalano

SWORN TO AND SUBSCRIBED
Before me this 18th day of Junio, 2003.

Maria Cristina Perse Soto
Notary Public

APPENDIX J

IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C.A. No. 20135

CANDLEWOOD TIMBER GROUP LLC and
FORESTAL SANTA BARBARA SRL,
Plaintiffs,

v.

PAN AMERICAN ENERGY L.L.C.,
Defendant.

SECOND AMENDED COMPLAINT

Plaintiffs Candlewood Timber Group LLC ("Candlewood") and Forestal Santa Barbara SRL ("FSB"), by their undersigned counsel, for their Second Amended Complaint against defendant Pan American Energy L.L.C. ("Pan American"), allege as follows:

Nature of the Action

1. This is an action to bring a Delaware limited liability company to account for the harm it is inflicting to the plaintiffs' property and business. Plaintiff Candlewood is a Delaware limited liability company that aims to become a world leader in the sale of wood products derived from forests that are managed consistent with international standards of sustainable forestry. To that end, Candlewood formed an Argentine subsidiary, FSB, which purchased approximately 250,000 acres of forest land in a remote region of northern Argentina. Candlewood's business depends on its

ability to secure certification from an internationally recognized forestry organization that the forest lands owned by FSB are being managed in a sustainable manner.

2. Defendant Pan American is a Delaware limited liability company with two members that are Delaware corporations—BP Argentina Exploration Company ("BP Argentina"), an indirect subsidiary of oil and gas giant BP p.l.c. ("BP"); and Bridas Corporation, an oil company controlled by one of the wealthiest families in Argentina. Pan American is a self-described "leading regional player" in oil and gas production. It is the second largest hydrocarbon producer in Argentina, and has an exploration block portfolio of almost 5 million net acres. Pan American claims to be committed to the goals of "sustainability" and "zero environmental damage." Pan American is the majority owner and operator of a consortium of oil and natural gas companies that were granted concessionary rights to extract oil and gas from a region of Argentina that includes forest lands owned by FSB.

3. When Pan American sought permission from FSB to enter its land, the Manager of Forestry Resources for FSB explained the sustainable forestry objectives of FSB and Candlewood. Pan American committed to providing FSB with an environmental impact study, undertaking environmental remediation, and informing FSB if Pan American intended to use the earth that it excavated. The authorization permits issued at Candlewood's direction by FSB to Pan American expressly obligated Pan American to purchase comprehensive liability insurance, to indemnify FSB for any damage to its real property, and to "repair or replace" any property damaged by Pan American, at FSB's election.

4. Notwithstanding those contractual commitments, Pan American has engaged in mammoth excavation activities on FSB's property that have inflicted and continue to inflict widespread, unremediated damage. Pan American has refused all entreaties to live up to its contractual obligations or

conform its conduct to international industry standards for forest engineering. Consequently, FSB and Candlewood are unable to secure the forestry certifications that are necessary to their business.

5. By this action, Candlewood and FSB seek specific performance of Pan American's obligation to obtain comprehensive insurance as well as damages, including disgorgement of all monies unjustly saved through Pan American's improper and unauthorized use and destruction of FSB's property.

The Plaintiffs' Sustainable Forestry Project

6. Plaintiff Candlewood is a Delaware limited liability company with its principal place of business in New York. All of Candlewood's unit holders are United States citizens or legal entities. Candlewood's Chairman, John C. Gordon, is the former Dean of the Yale School of Forestry and Environmental Studies, and the Senior Partner in a forestry consulting firm that works extensively in the field of sustainable forestry. Candlewood's Chief Executive Officer, Ralph Schmidt, is a former Senior Advisor and Director of Forest Programs at the United Nations Development Program. All of Candlewood's officers and directors are U.S. citizens residing in the United States.

7. Plaintiff FSB is an Argentine corporation all of whose stock is beneficially owned by Candlewood. FSB is the vehicle through which Candlewood conducts its sustainable forestry business. The members of the executive committee of the board of directors of Candlewood are directors of FSB.

8. Candlewood was organized to demonstrate that sustainable forestry principles can be applied on a commercially viable basis in South America. In 1997 and 1998, Candlewood loaned and invested funds allowing FSB to acquire approximately 250,000 acres of forest land. This land includes approximately 70,000 acres of lowland tropical

forest in the Province of Salta, a remote northern area of Argentina adjacent to Bolivia (the "Candlewood Forest Property"). Candlewood formed FSB to acquire and manage these Argentine forest lands and to conduct initial processing of timber harvested from its lands. The project is among the largest privately owned sustainable native forestry projects in South America.

9. Sustainable forestry is designed to foster both the renewal of prime forest resources and employment opportunities for local residents. It allows for the preservation of the long term environmental benefits of forest lands while realizing the economic and social values of marketable timber. Sustainable forestry involves the extraction of such timber from prime forest lands, while preserving intact the forest and its valuable environmental habitats and biodiversity.

10. The practice of sustainable forestry is recognized today as an important policy objective by many governments, the United Nations, the World Bank and leading U.S. environmental and non-governmental organizations ("NGOs"), including the World Wildlife Fund ("WWF"), and the Natural Resources Defense Council ("NRDC"). In 1998, the World Bank and WWF formed the Alliance for Forest Conservation and Sustainable Use specifically to encourage sustainable forest practices.

11. An essential predicate to Plaintiffs' sustainable forestry project is certification of their practices from a recognized certification body such as the Forest Stewardship Council ("FSC"), which is designed to assure consumers that certified timber products come from a forest employing sustainable forestry practices. Certification is critical to Candlewood's plans for raising capital, expanding its business to include other forest areas, and marketing its forest products in the United States. Many large U.S. retailers of veneer and wood products, such as Home Depot, will not buy or sell exotic

woods or veneers that do not have the imprimatur of NGOs recognized as leaders in the area of environmental preservation and a certification from FSC or another recognized environmental group that such woods are derived from a sustainable source.

12. The markets for the timber products produced at the Candlewood Forest Property, including lumber and veneer, are primarily located in the United States, where the products have a far greater market value than in Argentina or elsewhere in South America. Candlewood's principal place of business is located in New York, close to the markets for lumber and veneer and to the NGOs and environmentally concerned consumers whose support Candlewood must have for its lumber products to be marketed successfully.

13. Candlewood has responsibility for all aspects of the management, marketing and sales connected with its sustainable forestry business at the Candlewood Forest Property, including establishing strategic relationships, securing certifications, endorsements, and approvals essential to the success of the business, commissioning marketing studies, arranging for the importation of logs and lumber to the United States, securing necessary financing, and developing and servicing markets for its products. Candlewood has expended substantial time and money on such activities and expects to earn a substantial profit, favorable publicity and recognized standing as a world leader in sustainable forestry.

14. To obtain FSC certification, it is incumbent on Candlewood and FSB to implement forest management plans that preserve biodiversity and habitat value. The Candlewood Forest Property is part of one of the few largely undisturbed lowland forests of its type in Argentina. As the southernmost extension of tropical vegetation in South America, the forest is one of the most diverse forest ecosystems in the world. In addition to its botanical diversity, it provides an important habitat for more than a dozen amphibian species found only

in the small expanse of this forest type in Argentina. The Candlewood Forest Property is home to a number of other species of high conservation interest, including jaguar, tapir, peccary, toucan, and a vast array of migratory birds. At the time FSB acquired the Candlewood Forest Property, most of the property was inaccessible and had not been subjected to human influence to any appreciable extent.

15. The Candlewood Forest Property has large quantities of valuable timber, including timber that is suitable for fine veneer, such as roble and cedro. Such timber extracted from sustainably managed forests commands a high price in markets in the United States.

16. After acquiring the Candlewood Forest Property, Candlewood prepared a "sustainability plan" to govern its timber operations while preserving the forest's resources, environment and biodiversity, and conducted inventories and baseline scientific studies, all in furtherance of Candlewood's goals of certification and sustainable forestry.

Pan American's Contractual Commitments

17. Defendant Pan American is a Delaware limited liability company with oil and gas operations throughout the Southern Cone of South America. Pan American has certified reserves approaching 2 billion barrels of oil equivalent. Its activities include oil and gas exploration, development, and production; refining; transport of natural oil and gas; and export of oil, liquefied natural gas, and/or natural gas to markets in various regions, including the United States. On information and belief, in the course of these operations, Pan American's officers and managers frequently conduct business in the United States. The 60% owner of Pan American is BP Argentina, a Delaware corporation and indirect subsidiary of BP. Pan American is the principal vehicle for BP's oil and gas activities in Argentina, Bolivia, Brazil, Chile and Uruguay. On information and belief, (i) Pan American's

officers and managers include employees of BP who report to BP's offices in the United States on a regular basis; (ii) BP reviews at its offices in the United States plans for oil and gas exploration and development, marketing plans, standards for environmental conduct, and other matters related to the activities of Pan American; (iii) employees of Pan American regularly attend meetings at the offices of BP in the United States.

18. BP claims to recognize the importance of sustainable development as an essential component of its business practices, promising on its web site and in its annual reports increased "transparency" of its work in environmentally sensitive areas throughout the world, and the aim of "no damage to the environment." Pan American similarly claims on its website that one if its objectives is "zero environmental damage." Pan American's actions on the Candlewood Forest Property reflect a very different order of priorities: the subordination of environmental concerns to cost-savings, and the violation of plaintiffs' property rights.

19. The Candlewood Forest Property is located within the "Acambuco block," a long-term (approximately 30 years) government oil and gas concession. In 1997, Pan American succeeded to a majority interest in the Acambuco concession. Pan American is the designated operator of the Acambuco block for a consortium of oil and gas companies, which together make up 100% of the concessionaires of the Acambuco block. This temporary consortium of oil and gas companies is known as UTE Acambuco.

20. As operator of UTE Acambuco, Pan American has the right to extract the oil and gas underneath the Candlewood Forest Property. Pan American does not have the right, however, to extract oil and gas in a manner that damages the property of the landowner, FSB, without full compensation and restoration.

21. On September 29, 2000, Pan American requested authorization from FSB to enter a portion of the Candlewood Forest Property for the purpose of beginning topographical surveys and a forestry inventory, and constructing a road and drilling an oil well known as San Pedrito IV. Pan American had previously corresponded and communicated with Miguel Romero, the Manager of Forestry Resources for FSB, who had informed Pan American about the sustainable forestry objectives of FSB and Candlewood and the restrictions governing their activities.

22. On October 2, 2000, Romero of FSB wrote to Pan American to request various information, including specifications for the road that Pan American planned to construct, environmental impact studies for the road and the well at San Pedrito IV, environmental mitigation measures, and the extent of any planned earth movement.

23. Pan American replied by letter on October 11, 2000. In that letter, Pan American stated that it would provide an environmental impact study, that it would draw up a list of remediation and improvement tasks upon the completion of the site, that no movement or use of earth was currently planned, and that Pan American would inform FSB if Pan American decided that excavated earth could be used in its construction work.

24. If it chose, FSB could have asserted objections to Pan American entering its property at that time. Instead, FSB, acting at the direction of Candlewood, entered into negotiations with Pan American that culminated in FSB issuing one-page documents, dated, October 18, 2000, and November 7, 2000, providing that, in exchange for stated conditions, Pan American could enter and stay temporarily on the Candlewood Forest Property for the purpose of drilling San Pedrito IV and constructing a new road. Both documents state that they are without prejudice to the obligations listed by FSB in its letter of October 2, 2000 and accepted by Pan

American in its letter of October 11, 2000. Additionally, in each document, Pan American accepted three obligations: (1) to purchase comprehensive insurance, (2) to hold harmless FSB from any claims by third parties, and (3) to indemnify FSB for any damage caused to "properties or any other assets (moveable or real estate) owned by FSB whether the damage is produced directly or indirectly by any employee or person or company contracted by Pan American, with obligation to repair or replace the asset damaged at the choice of FSB, immediately." Unofficial translations of the two permits are attached hereto as Exhibits A and B. Pan American initialed one of the permits and proceeded to enter the Candlewood Forest Property to perform the activities for which they had requested permission.

25. In April 2001, Ralph Schmidt and Jeffrey Kossak of Candlewood held an introductory meeting with Alberto Gil, the Chief Operating Officer of Pan American, in Buenos Aires. They provided Gil with a copy of the joint business plan for FSB/Candlewood, explained the nature of sustainable forestry, and informed Gil about the need to obtain FSC certification. FSB separately sent a letter to Pan American requesting information for the purpose of expediting an evaluation of the damage caused by Pan American, including environmental impact studies, data concerning the quantity of earth removed, and an environmental damage mitigation plan.

26. On June 25, 2001, Pan American requested that FSB authorize its entry on another section of the Candlewood Forest Property, in order to undertake seismic surveying in anticipation of future oil and gas exploration. When FSB insisted that certain conditions be satisfied, Pan American sent a letter on August 13, 2001 claiming that it was entering the property as of right. As reflected in an unofficial translation of that letter, Pan American offered nominal compensation for "presumed damage" that it would cause, and acknowledged that such payment was "without prejudice

to further compensation for possible more extensive damage actually cause[d], which cannot be avoided in spite of the prevention measures we will adopt."

27. On September 26, 2001, Pan American requested authorization to enter the Candlewood Forest Property for additional construction work and laying of pipes for San Pedrito IV. Pan American committed to various general measures for the prevention and mitigation of environmental impact. Pan American stated that it would take several steps to protect against erosion, and would undertake revegetation and reforestation measures. As reflected in an unofficial translation of that letter, Pan American also committed to a "quarterly monitoring plan to check the effectiveness of erosion control work and revegetation measures."

28. FSB countersigned the September 26, 2001 letter from Pan American.

Plaintiffs Document the Unremediated Property Damage Caused by Pan American

29. By the end of 2001, Pan American had proceeded with the construction of San Pedrito IV and access roads, and had begun constructing a lengthy gas pipeline and gas pipeline right-of-way across a portion of the property.

30. In December 2001, Ralph Schmidt of Candlewood conducted a field inspection of the Candlewood Forest Property and discovered that Pan American's use of and damage to FSB's property was much greater than previously thought.

31. During the period of December 2001 through the Spring of 2002, representatives of Candlewood and FSB met and corresponded repeatedly with representatives of Pan American to explain the extent of the property damage inflicted by Pan American and how it was preventing Candlewood and FSB from obtaining the sustainable forestry

certification that was necessary for their business to go forward. Pan American denied that it had caused any damage.

32. In the summer of 2002, Candlewood commissioned a study by Dennis P. Dykstra, Ph. D., P.E., of Oregon-based Blue Ox Forestry. Dykstra is a leading international forestry engineering consultant and the former Deputy General of the World Bank-sponsored Center for International Forestry Research, the leading international research institute for tropical forestry. In July 2002, Dysktra undertook a field inspection of the roads and infrastructure constructed by Pan American on the Candlewood Forest Property. Schmidt and Dykstra then met with officials of Pan American in Buenos Aires, at which Dykstra provided an oral report of his findings. Dykstra then prepared a written report for Candlewood, which Candlewood provided to Pan American. The relevant portions of Dykstra's report (Sections 1, 2 and 5) are attached hereto as Exhibit C.

33. As explained in Dykstra's report, Pan American constructed access roads using the "cut and fill" method, by which excess earth removed from a hillside is cast down the slope below the road. This practice of "sidecasting" excess soil and base materials not only takes valuable land out of production (i.e., the forested land below the road), it creates a risk of massive erosion. The highly erodible sandstone-based soil tends to lie loosely on the slope and is easily eroded. This poses the threat of undermining the roadways, while increasing the risk of stream sedimentation. Dykstra further explains that the appropriate method for constructing roadways placed on sandstone soils is the "full bench and endhaul" method, whereby roads are excavated to bedrock and the excavated materials are loaded into dump trucks and carted to a location where the materials can be dumped safely. Sidecasting excess material is cheaper than endhauling. Pan American saved money by destroying valuable productive timberland and increasing erosion and stream

sedimentation. Indeed, erosion had already begun at the time of Dykstra's report.

34. Dykstra also observed in his report that Pan American had failed to revegetate cleared lands, creating a significant erosion hazard. The proximity of the access road to the property line also created numerous "orphaned" areas of forest that cannot be managed and are thus taken out of production.

35. On or about September 17, 2002, Dykstra prepared a follow-up "Executive Summary" in which he discussed several "potentially adverse impacts" arising from the infrastructure developed by Pan American on the Candlewood Forest Property. Those are (1) the displacement of approximately 183.4 hectares of land that otherwise could be used for the production of timber (or potentially for "carbon credits" should carbon markets develop), (2) the removal of approximately 965 hectares of "buffer zones" around the Pan American infrastructure, which cannot be deemed to be under the management of FSB for purposes of sustainable forestry certification, (3) the sidecasting of excavated materials, which is generally regarded as incompatible with sustainable forest management, and (4) the significant erosion hazard posed by the removal of vegetation from relatively steep slopes. Dyskstra's Executive Summary is attached hereto as Exhibit D.

36. On January 10, 2003, Dykstra provided Candlewood with a summary of internationally accepted forest road engineering practices, coupled with an analysis of the construction methods used by Pan American. Dyskstra concluded that Pan American had not followed generally accepted engineering practices for constructing roads on steep slopes with unstable soils, and that environmental damage appeared to be occurring as a result of the poor engineering and construction practices that Pan American followed. Of particular concern to Dykstra was the "very high volume of

unstable sidecast material." Dykstra's report of January 10, 2003 is attached hereto as Exhibit E.

The Effect of Pan American's Conduct

37. Pan American's methods of operation have resulted in a significant degradation of the environment and biodiversity of the Candlewood Forest Property through, among other things, direct forest loss, fragmentation of habitats, soil movement and erosion, runoff, sidecasting, creation of access corridors that facilitate the illegal intrusion of hunters and cattle, invasion of exotic and non-indigenous species, and creation of substantial risk of forest fires. Pan American's actions have caused widespread deforestation, the continuing loss of necessary early stage tree growth, reduction of forest regeneration, increased risk of stream sedimentation, and damage to land, the environment, and habitats for plants and animals. As a result, these portions of the Candlewood Forest Property will be permanently disqualified for FSC certification. On information and belief, Pan American and its agents also have been storing and/or disposing of toxic or flammable drilling or operational by-products, materials and wastes on or in the Candlewood Forest Property, which has and will continue to threaten the environment and biodiversity of the forest.

38. Pan American still refuses to acknowledge the damage it has caused, and refuses to take steps that might limit further erosion. In response to plaintiffs' requests for information that would allow plaintiffs to assess with more precision the damages caused to the Candlewood Forest Property, Pan American has furnished only incomplete and misleading information that fails to address the direct or cumulative effects of its operations and infrastructure.

39. As a result of the conduct described above, Candlewood and FSB have been forced to postpone the SmartWood environmental audit, suspend further harvesting of the

Candlewood Forest Property, and delay Candlewood's initial entry into the United States market. The forest products of the Candlewood Forest Property cannot properly be marketed in the United States without certification by SmartWood or a similar organization that such products are from sustainable sources. Indeed, certification is a premise of the business plan for FSB and Candlewood.

COUNT ONE
(*Breach of Contract*)

40. The preceding paragraphs are realleged as if fully set forth herein.

41. On October 19, 2000, and November 7, 2000, following correspondence between the parties, FSB issued permits at Candlewood's direction to Pan American authorizing its entry onto the Candlewood Forest Property.

42. Pan American accepted the obligations set forth in those permits.

43. On September 26, 2001, Pan American committed to undertake certain preventive and remediation measures, which FSB acknowledged.

44. Pan American's conduct, as set forth above, is in direct breach of its obligations under the permits and the correspondence. Candlewood and FSB has been harmed by Pan American's breaches of contract.

45. Candlewood and FSB are entitled to indemnification for their losses, and specific performance to compel Pan American to purchase comprehensive liability insurance, as Pan American had committed to do.

COUNT TWO
(*Negligence*)

46. The preceding paragraphs are realleged as if fully set forth herein.

47. Pan American knew or should have known of the Candlewood Forest Property's unique environment, biodiversity and habitats, and the plans of Candlewood and FSB to conduct a sustainable forestry business in the Candlewood Forest Property.

48. Notwithstanding such knowledge, Pan American conducted its activities at the Candlewood Forest Property in a negligent and reckless manner which it knew or should have known is antithetical to, and in violation of, accepted international standards for forest engineering. Pan American was negligent and reckless in that it, among other things, conducted the following activities, all in violation of accepted standards: (i) the massive, uncontrolled excavation and clearing of forest and vegetation; (ii) the sidecasting of more than one million cubic yards of soil, rock, earth and vegetation; (iii) the constructing of roadways, spur roads and pipeline that are overly invasive and that cause a significant risk of fire, erosion, landslides and runoff, as well as damage to wildlife; and (iv) the storing and disposal of toxic and/or flammable materials on the Candlewood Forest property

49. As a result of Pan American's negligent and reckless activities, Candlewood and FSB have suffered direct and indirect damages including but not limited to (i) approximately 3,000 acres of valuable forest land that were cut or made inaccessible to or unusable for sustainable forestry activity; (ii) the cost of control of the Candlewood Forest Property, including the cost of surveillance and controlling of intruders and forest fire; (iii) the cost of removing the earth and organic matter dumped on the Candlewood Forest Property by Pan American; (iv) the cost of stabilizing slopes

and sidecast material and otherwise mitigating, to the extent feasible, Pan American's misconduct; and (v) the consequent damage to the businesses and business prospects of Candlewood and FSB, including their ability to carry out sustainable forestry at this and other properties.

COUNT THREE
(*Fraud*)

50. The preceding paragraphs are realleged as if fully set forth herein.

51. In exchange for permission to enter the Candlewood Forest Property, Pan American agreed to reimburse FSB for damage to the Candlewood Forest Property, including compensation to FSB for restoration of the Candlewood Forest Property or, at FSB's option, to repair or restore any damage they caused.

52. Candlewood and FSB also understood that the parties would engage in good faith negotiations to determine the amount of compensation due them for any soil or water used by Pan American in the course of their construction and activities. Pan American not only failed to compensate FSB, it failed to negotiate a price, failed to inform FSB of its use of FSB's soil and water, and has continued to deny its use of such soil despite incontrovertible evidence to that effect.

53. Pan American also falsely and fraudulently held itself out to FSB and Candlewood as following and adhering to the highest engineering, construction, and environmental standards and practices in connection with its activities in or adjacent to the Candlewood Forest Property.

54. Candlewood and FSB justifiably relied on these agreements and representations when granting Pan American permission to conduct activities in the Candlewood Forest

Property. Pan American in fact misrepresented its intentions with regard to the Candlewood Forest Property, causing Candlewood and FSB to suffer substantial losses.

COUNT FOUR

(*Tortious Infringement of Property Rights*)

55. The preceding paragraphs are realleged as if fully set forth herein.

56. Pan American's excavation of roads in the Candlewood Forest Property uncovered and used, without permission, deposits of sand, rock and soil for surfacing and fill material for their roads and well sites. Pan American also has misappropriated FSB's earth, timber, and, on information and belief, water for their own use, without the consent of or compensation to FSB.

57. As a result of the destruction of timber and forest on the Candlewood Forest Property by Pan American, FSB and Candlewood have been deprived of their interest in the carbon sequestration credits produced by that forest.

58. Candlewood and FSB are entitled to compensation for Pan American's misappropriation of the natural resources, timber and land that FSB owns, as well as their right to use and enjoyment of the Candlewood Forest Property, all of which have been misappropriated by Pan American.

59. Candlewood and FSB have been severely injured as a result of Pan American's conduct as described above.

COUNT FIVE

(*Tortious Interference with Business Relations*)

60. The preceding paragraphs are realleged as if fully set forth herein.

61. Candlewood and FSB informed Pan American that it is essential to the success of their business that the Candlewood Forest Property be certified as sustainably managed under international forestry criteria.

62. Pan American has engaged in intentional, unjustified conduct that has prevented Candlewood and FSB from obtaining the certifications necessary to operate their business.

63. Pan American's intentional, unjustified conduct has also limited the scope of Candlewood's and FSB's business, by precluding certain portions of the Candlewood Forest Property from being productive, and by limiting the amount of "carbon sequestration credits" that Candlewood can potentially sell in the developing international market.

64. As a result of Pan American's intentional conduct, Candlewood and FSB have suffered lost business opportunities, and consequently lost profits and loss of the value of their investment.

WHEREFORE, plaintiffs pray that the Court enter judgment in their favor and against defendant Pan American as follows:

(A) An order compelling Pan American to obtain and maintain in effect sufficient casualty, liability and fire insurance policies to protect FSB against any loss of value to the Candlewood Forest Property from casualty, including, without limitation, forest fire, and any liability and injury to employees, agents, contractors or other representative of Plaintiffs, and to include Plaintiffs as named insureds of such policies;

(B) Compensatory damages;

(C) An order directing Pan American to disgorge and pay over to plaintiffs all savings and avoided costs retained by Pan American by virtue of its unlawful and improper actions on the Candlewood Forest Property;

(D) Pre and post-judgment interest;

(E) Reasonable attorney fees, expenses and costs; and

(F) Such other relief as may be just and proper.

/s/ Joel Friedlander
JOEL FRIEDLANDER
BOUCHARD MARGULES & FRIEDLANDER
222 Delaware Avenue, Suite 1400
Wilmington, Delaware 19801
(302) 573-3500
Attorneys for Plaintiffs

DATED: May 21, 2003

[EXHIBIT A]

TEMPORARY ENTRY, TRAFFIC AND STAY PERMIT

We hereby authorize PAN AMERICAN ENERGY LLC (PAE) to enter, pass and stay temporarily for the duration of the work in lots 4340 and 4339 property of Forestal Santa Barbara S.R.L (FSB).

Obligation of Pan American Energy LLC: Without prejudice to the obligations related to hydrocarbon exploration and exploitation for which PAE must have a specific authorization and the requisites previously listed in FSB note dated October 2, 2000, and accepted by PAE in its reply of October 11, 2000, PAE must comply with and accepts the following obligations:

1. To take comprehensive civil liability insurance for the risks arising from its activity, as well as insurance, for the transport used. PAE must show FSB the policies taken, which must indicate that, in the event of non-payment thereof, the insurer will have to inform FSB of said circumstance immediately.

2. Hold harmless FSB against any claim from third parties, be they private persons or sections or offices of the national, provincial or municipal state, lodged due to acts or omissions of PAE, its employees or the persons contracted by it.

3. Hold harmless FSB for all and every one of the losses caused in properties or any other assets (moveable or real estate) owned by FSB whether the damage is produced directly or indirectly by any employee or person or company contracted by PAE, with obligation to repair or replace the asset damaged at the choice of FSB, immediately.

In the city of Salta, the 18th day of October 2000

Miguel Alfaro Romero
Forestal Santa Barbara S.R.L.
Representative

[handwritten]
received 10/19/00

[EXHIBIT B]

TEMPORARY ENTRY, TRAFFIC AND STAY PERMIT

We hereby authorize PAN AMERICAN ENERGY LLC (PAE) to enter, pass and stay temporarily for the duration of the work in lots 4340 and 4339 property of Forestal Santa Barbara S.R.L (FSB).

This permit gives PAE authorization to open a new road from the location of the SAN PEDRITO 4 WELL TO THE JUNCTION WITH THE OLD ROAD TO ACAMBUCO (MACUETAS) AND TO REOPEN THE ROAD FROM SAID JUNCTION TO MACUETAS ACCORDING TO THE PLAN PRESENTED IN DUE TIME BY FSB.

Obligation of Pan American Energy LLC: Without prejudice to the obligations related to hydrocarbon exploration and exploitation for which PAE must have a specific authorization and the requisites previously listed in FSB note dated October 2, 2000, and accepted by PAE in its reply of October 11, 2000, PAE must comply with and accepts the following obligations:

1. To take comprehensive civil liability insurance for the risks arising from its activity, as well as insurance, for the transport used. PAE must show FSB the policies taken, which must indicate that, in the event of non-payment thereof, the insurer will have to inform FSB of said circumstance immediately.

2. Hold harmless FSB against any claim from third parties, be they private persons or sections or offices of the national, provincial or municipal state, lodged due to acts or omissions of PAE, its employees or the persons contracted by it.

3. Hold harmless FSB for all and every one of the losses caused in properties or any other assets (moveable or real estate) owned by FSB whether the damage is produced directly or indirectly by any employee or person or company

contracted by PAE, with obligation to repair or replace the asset damaged at the choice of FSB, immediately.

In the city of Salta, the 7th day of November 2000

[signature]
Miguel Alfaro Romero
Forestal Santa Barbara S.R.L.
Representative

[EXHIBIT C]

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Consultancy Report

Visit to
Forestal Santa Barbara S.R.L.

a subsidiary of
The Candlewood Timber Group, Inc.

Salta, Tartagal, Orán, and
Buenos Aires, Argentina

San Pedro and La Candelaria
Properties

July 20-28, 2002

1. Overview

The purposes of this visit were as follows:

a) At San Pedro, to undertake a field inspection of the roads and other infrastructure constructed by Pan American Energy LLC (PAE) in connection with the emplacement of two natural-gas wells sited on or near the property.

b) Also at San Pedro, to examine the area of the pilot harvesting operation that was conducted by Forestal Santa Barbara (FSB) in 2001 in order to visually assess the condition of residual timber on the area and to evaluate the quality of the harvesting operation itself.

c) For the Candelaria property, to form an overall impression of the commercial timber stocking on the area and the degree to which various harvesting systems might be appropriate for utilizing the mature timber on the property.

d) In Buenos Aires, to meet with officials of Pan American Energy and provide a brief oral report on the findings of the visit, especially as they pertain to the request for damage compensation that has been filed with PAE by FSB.

2. PAE Infrastructure in San Pedro

Location of Access Roads

The road constructed by PAE to provide access to its "San Pedrito 3" and "San Pedrito 4" natural-gas wells generally follows a major ridgeline that traces the eastern boundary of FSB's San Pedro property. PAE contends that the main road lies primarily *outside* of FSB's property. FSB disputes this, and has had a cadastral survey done to establish the exact location of the road with respect to the property lines. A

formal survey map, which indicates that most of the road lies within FSB's property, has been submitted to the Salta provincial government for certification. Formal approval of the survey is expected in the near future.

In addition to the main road, "spur" roads were constructed by PAE from the main road to the sites of the two natural-gas wells. These spur roads appear to have been constructed to the same standards as the main road. The spur road to San Pedrito 3 lies partially on fiscal lands managed by Salta Province immediately to the south of San Pedro and partially on FSB's San Pedro property. Based on a cursory examination of ownership maps, about 75% of the spur road appears to lie within the San Pedro property. The spur road to San Pedrito appears to lie entirely within the property.

[Figure one in original omitted.]

APPENDIX K

IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C.A. No. 20135

CANDELWOOD TIMBER GROUP, LLC and
FORESTAL SANTA BARBARA, SRL,
Plaintiffs,

v.

PAN AMERICAN ENERGY, LLC
Defendant.

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

AFFIDAVIT OF DR. SAUL LITVINOFF

Dr. Saúl Litvinoff, a person of the full age of majority and a resident of the Parish of East Baton Rouge, State of Louisiana, after being duly sworn, deposes and says:

1. I. am a native of Argentina and I read, write, and speak the Spanish, French, and English languages fluently. I received an LL. B degree from the University of Buenos Aires Law School in 1949 and an S.J.D. degree from the same institution in 1956. I also received an LL. M. degree from Yale University Law School in 1964. I am a member of the Argentine National Academy of Legal and Social Sciences. A copy of my *curriculum vitae* is annexed hereto as Appendix "A".

2. I am presently a Boyd Professor of Law at the Louisiana State University Paul M. Hebert Law Center where I teach courses on Obligations, Contracts and Sales on a comparative basis. I am also Director of the Center of Civil Law Studies of

the same law center, where one part of my functions is to keep up to date the legislation and legal doctrine of jurisdictions where the civil law system prevails, for teaching and consultative purposes. I have written extensively on the Comparative Law of Contracts and Obligations and taught courses on the subject in Argentina, France, Belgium, England, Italy, and Greece.

3. In addition to my professional experience as a practitioner in Argentina and an academician in Puerto Rico and Louisiana, I have acquired extensive knowledge of civilian jurisdictions based on French civil law and Spanish civil law.

4. In addition, in 1999 I published a treatise on the law of damages, dealing with theoretical and practical aspects of damage recovery on a comparative basis.

5. As requested by Mr. Joel Friedlander, counsel for plaintiffs, I carefully read the complaint and amendments thereto in the case entitled Candlewood Timber Group LLC and Forestal Santa Barbara, SRL vs. Pan American Energy LLC, CA No. 20135, filed in the Court of Chancery of the State of Delaware. I have also carefully examined a petition for declaratory relief (*acción declarativa*) filed in the Supreme Court of Argentina by Pan American Energy LLC. against Forestal Santa Barbara, SRL and Candlewood Timber Group, LLC and others, including the Argentine State and the province (state) of Salta, and other documents provided to me by Mr. Friedlander.

6. Under principles of Argentine Private International law, this is a case in which Delaware courts would have international jurisdiction (*jurisdicción internacional*), since the fact that one of the plaintiffs and the defendant are Delaware corporations makes the Delaware court a proper forum to adjudicate a dispute involving the personal rights of the

parties. Title to real estate or other real rights will not be affected by this litigation. See, generally I Boggiano, *Derecho Internacional Privado* 231 et seq. (1991).

7. There is nothing in Argentine law providing for exclusive jurisdiction and/or venue of an action for damages that does not involve the nation of Argentina or one of its provinces (states) as a party litigant. See Articles 116 and 117 of the Constitution of Argentina, providing for the exclusive jurisdiction of the Argentine federal courts in certain specific limited instances.

8. In particular, there is nothing in the Civil Code of Argentina, the Mineral Code (Ley no. 1919, as amended), or the Oil and Gas Law (Ley no. 17,319 as amended), providing that an action by a landowner against a mineral lessee, or an operator of a mineral lease, for damages and other relief must be brought in Argentine courts. Nor do the above referenced statutes provide for specific courts, national or provincial, where suits arising under these statutes are to be brought.

9. The situation involved in this case is different from the one in *Taylor v. LSI Logicorporation*, 715 A. 2d 837 (Del. 1998), in that there is no mention in any of the pertinent Argentine statutes of a particular court or a geographic location where suit must be brought in actions arising under the statutes. Thus, the pertinent Argentine statutes do not provide for subject matter jurisdiction in any particular court where suit must be brought.

10. The facts of this case do not involve the Argentine nation or one of the provinces (states) as a party litigant. The mere fact that the rights of a mineral lessee may arise from a contract, concession, servitude, or assignment granted by the Argentine federal government, or the government of one of the provinces (states) does not make the grantor sovereign a party under Argentine law. Since title to the minerals can not

be affected by this litigation, neither the Argentine state nor the province (state) of Salta has an interest in the outcome of this case.

11. To the extent that Argentine law applies to this dispute, the articles of the Civil Code of Argentina, the Mineral Code, and the Oil and Gas Law, provide the substantive rules of decision for the resolution of the issues raised by the facts alleged in the complaint. The facts, as recited by plaintiffs, disclose causes of action for recovery of damages under these statutes.

12. Under the Oil and Gas Law of Argentina (*Ley de Hidrocarburos*), and other laws, mineral lessees must repair the damage caused to the owner of the surface by their mining activities.* Article 100 of the Oil and Gas Law provides that the parties to a dispute arising from oil and gas operations may, by mutual consent, agree that the damage recovery shall be the one measured by the federal executive (administrative) authorities in the zone involved. In order for this remedy to be possible it is necessary that both the surface owner and the mineral lessee agree to the measurement of damages by the administrative authorities. If both parties do not give their consent, then they are left to resort to the judicial remedies that may be available: that is, to litigate the matter in whatever court or courts may be of proper jurisdiction or venue, without specifying whether in Argentina or abroad.

---

* Specifically, Article 100 of the Oil and Gas Law provides as follows:

"Permittees and grantees must indemnify surface owners for damages caused to the affected estates by the activities of the former. The interested parties can judicially demand the calculation of the awards or accept—by mutual consent, and as an option that excludes other remedies—those that are determined, or which may he determined, by the executive power in the zone, and without the necessity of proof by the owners."

13. Article 100 of the Oil and Gas Law does not prevent the surface owner and the lessee from entering into a private contract between them respecting liability and damage from mining or drilling activity.

14. Moreover, there is nothing in the Civil Code of Argentine, the Mineral Code or the Oil and Gas Law prohibiting the Argentine nation or the provinces (states) from litigating outside Argentina or submitting substantive rights to arbitration. Both the federal and state Argentine sovereigns can waive their right to have their substantive rights determined by the Argentine federal courts. Litigating in the Argentine federal courts is a sovereign prerogative, not a prohibition to the sovereign to litigate elsewhere. Accordingly, even if the Argentine nation or one of the provinces (states) is made a party defendant in a particular case outside the Argentine federal judicial system, the sovereign defendant could certainly choose to waive its right to litigate in Argentine federal courts; other defendants have absolutely no standing to raise this right.

And Further Affiant Sayeth not.

/s/ Dr. Saul Litvinoff
DR. SAUL LITVINOFF

Sworn to and subscribed BEFORE ME this 16th day of May, 2003.

/s/ James J. Carter, Jr.
NOTARY PUBLIC

Supreme Court, U.S.
FILED
JAN 7 - 2005
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(2)

No. 04-778

IN THE

Supreme Court of the United States

PAN AMERICAN ENERGY, LLC,

Petitioner,

v.

CANDLEWOOD TIMBER GROUP, LLC
and FORESTAL SANTA BARBARA SRL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court posses jurisdiction when (a) the petition fails to show that any federal question was raised in or passed upon by the state courts; and (b) contrary to the mandate of 28 U.S.C. § 1257, there is no final judgment?

2. In an ordinary common law action seeking money damages for breach of contract and tort by a Delaware plaintiff against a Delaware defendant that stemmed from injury to land and chattels located in a foreign country and plaintiff's business in the United States, did the Delaware Supreme Court err in not finding some state court subject matter jurisdiction limitation simply because defendant's business operations are also subject to certain foreign regulatory controls?

RULE 29.6 STATEMENT

Respondent Forestal Santa Barbara SRL is a wholly owned subsidiary of Candlewood Timber Group, LLC. There is no parent or other publicly held corporation that owns more than 10% of Candlewood's stock.

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COUNTERSTATEMENT OF THE FACTS

Since the petition scarcely makes any contact with the case actually presented to, or decided by, the court below, a brief counterstatement of the relevant facts is necessary. We, therefore, focus directly upon the decision of the Delaware Supreme Court. (App. 1a-32a).

FACTS. The Delaware Supreme Court opinion begins with a description of the controversy before it: a common law contract and tort dispute against a Delaware business entity resulting from injury caused by defendant's drilling operations. Together with its wholly owned subsidiary, plaintiff Candlewood, also a Delaware business entity, engages in the business of "sell[ing] wood products derived from South American forests that are managed consistently with international standards of sustainable forestry." Defendant (petitioner here) "engages in oil and gas extraction, [and] is the second largest hydrocarbon producer in Argentina." (App. 2a). Defendant holds "concessionary rights [granted] by the Argentine Republic (which owns all the oil and gas rights in Argentina) to extract oil and gas in [the Argentinian Province of] Salta," a concession that covers plaintiff's land. (App. 2a). Defendant sought permission to extract oil and gas from plaintiff's land; agreements were executed to that effect (App. 2a); and plaintiff alleges that defendant's drilling program caused "damages to trees, use of earth, and interference with the plaintiff's sustainable forestry business." (App. 28a n.50).

On January 28, 2003, plaintiff (and its wholly owned and controlled Argentinian subsidiary, app. 2a) filed suit in the Delaware Court of Chancery seeking both monetary and injunctive relief. Defendant's first response was to file a

counter-suit in the Supreme Court of Argentina alleging that jurisdiction over the dispute was exclusively in the Argentinian courts and that the simple existence "of the Delaware action and the threat of restraining orders" threatened vital Argentinian interests. Defendant "sought to join the Nation of Argentina and the Province of Salta as third parties so as to create original jurisdiction in the Argentine Supreme Court." (App. 3a).

Plaintiff thereupon filed a second amended complaint "that dropped all requests for injunctive relief, including relief that would require supervision of [defendant's] conduct on [plaintiff's] land in Argentina." (App. 3a-4a). The new complaint now simply alleged claims for money damages based upon various common law causes of action in contract and tort (App. 4a). On June 23, 2003, defendant filed a second action in an Argentine provincial court seeking to condemn plaintiff's land. (App. 4a) Argentina also filed a pleading in the Argentine Supreme Court, claiming that the "permanent injunctions being sought [in Delaware] put the basic institutions of the Nation [at] risk." (App. 5a). As the Delaware Supreme Court observed, this intervention was the result of defendant's "access to the highest levels of the Argentine government to influence both this litigation and [defendant's] second-filed action in Argentina." (App. 5a n.4). The government's pleading showed that the government was wholly unaware that plaintiff "was seeking only damages based upon common law claims arising out of private contracts," or that plaintiff had previously so informed both the Delaware Court of Chancery and the defendant. (App. 5a). In fact, the pleading made no reference whatsoever to the then existing second amended complaint in the Delaware court.

HOLDINGS. The Delaware Chancery Court dismissed the complaint on two state law bases: first, want of subject matter jurisdiction under state law, because the second amended complaint alleged no equitable causes of action; and second, the Delaware law of *forum non conveniens*. On appeal, petitioner presented no federal question of any kind to the Delaware Supreme Court. The solitary federal citation in its brief is a "see also" reference to *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947). Nor did defendant even cite the Restatement of Foreign Relations. In an opinion by Justice Jacobs, the Delaware Supreme Court affirmed in part and reversed in part:

- The Delaware Court of Chancery correctly held that it lacked subject matter jurisdiction because no equitable claims were presented. The case, accordingly, should be transferred to the Delaware Superior Court. Quite clearly, the allocation of subject matter jurisdiction within the Delaware judicial system presents no issue of federal cognizance, and the petition does not suggest otherwise.

- Turning to the issue of *forum non conveniens*, the Delaware Supreme Court reversed, stating that "its jurisprudence was clear and required proof of 'overwhelming hardship' from litigating a first-filed case in Delaware." (App. 16a). The court then considered the six "*Cryo-Maid*" factors,[1] which it said the Court of Chancery had correctly identified, but had misapplied. (App. 19a-25a). The petition, of

1. Referring to the factors set out *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1984) (Factors to be considered in *forum non conveniens* analysis).

course, does not, and could not, challenge the Delaware Supreme Court's ruling on the application of its own law. Rather, the petition's entire focus (pet. 14) is on a single point: the state court's alleged exclusion from its *forum non conveniens* analysis of any claim that "Argentina has a far greater interest in the controversy than does Delaware." (App. 16a).

- The third holding of the Delaware Supreme Court is one which (given its "exclusion" argument) petitioner assiduously seeks to obscure. (App. 25a-32a). Noting that "the real driver" of the Court of Chancery opinion was "the possibility that the Argentine courts have exclusive jurisdiction over the subject matter of the Delaware action," *id.* at 25a, the Delaware Supreme Court, addressed that issue separately rather than as one factor in its general *forum non conveniens* analysis. (App. 25a). This, we emphasize, is the very issue we are told over and over again by petitioner that the Delaware Supreme Court ignored! Suffice it at this point (*see* Point IIB, *infra)* to observe that the Delaware Supreme Court held that defendant had not established its claim of exclusive jurisdiction in the Argentine courts, but if it had, the Delaware Supreme Court would have given it the most careful respect under its "*Taylor*" holding.[2] Defendant not only did not meet its affirmative burden in demonstrating that Argentinian courts would have asserted exclusive jurisdiction, but well-recognized authorities such as

2. The court (App. 30a-31a) referred to its decision in *Taylor v. LSI Logic Corp.*, 715 A.2d 937, 842 (Del. 1988), discussing the Delaware courts' receptivity, as a matter of Delaware substantive law, to claims that foreign law localized the jurisdiction in foreign tribunals.

> Professor J.W. Moore's treatise, and the declaration by Professor Arthur von Mehren of Harvard Law School, demonstrated that the common law contract and tort claims asserted are transitory, not local, in nature. (App. 29a). Accordingly, under standard choice of law principles, these claims could be asserted in any court with personal jurisdiction over the litigants. And earlier in its opinion, the court stressed that Delaware has "a significant . . . interest in the lawsuit which is to make available to litigants a neutral forum to adjudicate commercial disputes against Delaware entities, even where the dispute involves foreign law and the parties and conduct are centered in a foreign jurisdiction." (App. 18a).

The Delaware Supreme Court decided no federal question because no such issue was submitted to it for decision.

REASONS FOR DENYING THE PETITION

This petition should be denied for at least a half dozen, independently dispositive, reasons. First, it seeks to persuade the Court to hear a case for the purpose of applying an asserted rule of federal foreign relations law that was never raised in, let alone considered by, the courts below. Second, there is no final judgment. Third, the petition seeks to persuade the Court to apply an asserted federal rule of foreign relations law that has never been considered, let alone applied, by any other court in the United States. Fourth, the petition is based on the factually incorrect assertion that the courts below did not give any consideration to the interests of Argentina, when they plainly did do so. Fifth, it asserts the applicability of an asserted rule of federal foreign relations law without remotely specifying the content of the proposed

rule. And sixth, there is no federal rule of foreign relations law that specifies what consideration a state court, in denying a *forum non conveniens* motion, must give to the interests of a foreign state that is neither an actual party, nor an indispensable party, to the action.

POINT I. THIS COURT HAS NO JURISDICTION

A. The Federal Question Presented For Review Was Not Presented Or Passed On Below.

Petitioner's Question Presented does not identify any federal question with anything approaching clarity.[3] *See* Point IIA, *infra.* In the section entitled Provisions of Federal Law Involved (pet. 1) we are told that "[t]his case involves principles of the federal common law of foreign relations." What we are not told, however, is where petitioner presented any issue of federal law for adjudication by the state courts, of where they passed upon such issues.

This Court's Rule 14.1(g)(i) requires that a petition for a writ of certiorari must set out with specificity when, how, and where the federal question sought to be reviewed was raised in the state court.[4] The petition makes no effort – none

3. "Whether a state court may wholly disregard foreign sovereign interests in deciding whether to exercise jurisdiction over a foreign dispute."

4. Sup. Ct. Rule 14.1(g)(i) provides:

> If review of a state-court judgment is sought, specification of the stage in the proceedings both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the

(Cont'd)

whatsoever – to comply with this rule. The petition does not specify when, where, or in what manner, defendant raised in the state proceedings the federal question sought to be reviewed. The issues raised in the Court of Chancery proceeding and on appeal before the Delaware Supreme Court were all framed solely in terms of Delaware law. The Delaware courts were never told that they were required to apply federal law. For that reason, neither the Court of Chancery nor the Delaware Supreme Court opinions make any reference to a federal common law of foreign relations. Here, we note, defendant has failed to explicitly raise below not some federal question which could be claimed to be obvious on the face of the complaint, or elsewhere in the record, but a federal common law outside the established doctrine of state action, as to the scope of which this Court has expressed serious reservations (*see* p. 11 n.6), as to which defendant cites no state case in which there is even a reference to the doctrine, and as to which the Delaware courts were not alerted by any Argentine governmental expressions of interest because these were all predicated upon an earlier, and quite different, version of the Delaware complaint.

(Cont'd)

> method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on the writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

The jurisdictional nature of petitioner's failure to present its federal claims to the state court needs no extended elaboration. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time. In *Cromwell v. Rendell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases . . . and came to the conclusion that the Judiciary Act of 1789, c. 20, 25, vested this Court with no jurisdiction unless a federal question was raised and decided below . . . This Court has consistently refused to decide federal constitutional issues raised here for the first time on a review of state court decisions both before the Cromwell opinion . . . and since . . ." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See also* 28 U.S.C. § 1257, which requires that the federal question have been "drawn in question" or "specially set up and claimed." *See also*, for example, *Webb v. Webb*, 451 U.S. 493, 498-99 (1981) (stressing the importance of the requirement that federal claims be presented to the state courts).[5]

Petitioner's failure to make any effort to comply with Rule 14.1(g)(i) speaks volumes: To repeat, the Delaware courts were never told that they must apply federal law.

B. There Is No Final Judgment.

Ever since the Judiciary Act of 1789, Supreme Court review of state courts has been limited to "final judgments or decrees" in order to minimize unwarranted intrusions upon

5. "Oblique" references to federal law will not do. "The vague appeal to constitutional principles does not preserve appellant's [constitutional] claims." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). "[A]t a minimum there should be no doubt from the record" where the federal claim was raised. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

state sovereignty. 1 Stat. 73, 85 ("final judgment or decree.") That restriction is carried forward in 28 U.S.C. § 1257. ("Final judgments or decrees.") Seeking to avoid the consequences of this obvious bar to jurisdiction, petitioner (pet. 11-12) invokes the standard refuge of litigants: the fourth exception described in *Cox v. Louisiana*, 420 U.S. 469, 482-83 (1975).

Petitioner argues that the judgment falls "squarely" within the fourth *Cox* exception, but in fact it clearly fails to meet several of its requirements. First, *Cox* requires that the "federal issue has been finally decided in the state court," *id.* at 482, but here, as discussed above, it was neither raised nor decided. Second, and importantly, *Cox* requires that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant causes of action," rather than merely affecting the structure of future proceedings. (*Id.* at 482-83). That condition cannot be satisfied here. Were this Court to fashion a new federal rule of *forum non conveniens* that states must follow, the rule could "take a number of [other] paths" that would not "preclude further proceedings in the state courts." *Nike v. Kasky*, 539 U.S. 654, 660 (2003). (Stevens, J. concurring). Most likely, for example, the Court would simply remand the matter to the Delaware Supreme Court for further proceedings in accordance with the new federal rule. And surely, continuance of the Delaware action can hardly "seriously erode foreign policy." 420 U.S. at 483 Defendant, it shall be noted, is not the government of Argentina. And because this is a suit for money damages, no Delaware court will order anyone in Argentina to do anything or supervise activities performed there.

The final judgment rule serves important federalism concerns. *Webb v. Webb*, *supra*, 451 U.S. at 499. It is not to be undercut by loose construction. In *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988), this Court construed the collateral order doctrine with respect to 28 U.S.C. § 1291, which governs appeals from "final decisions" of the district courts. It held that a denial of a plea of *forum non conveniens* was not appealable. Petitioner seeks to distinguish this quite dispositive holding in a footnote (pet. 12 n.1) with the unexplained assertion that § 1257 finality is not limited by the collateral order doctrine. This gets matters backwards. The tradition has been to cite precedents from the two statutes interchangeably, *see Cox*, 420 U.S. at 478 n.7; moreover, any difference between the two statutes would cut in favor of a stricter approach to the finality requirement in cases under § 1257. *See Cox*, 420 U.S. at 502-03 (Rehnquist, C.J., dissenting).

POINT II. THE CLAIM RAISED IS MERITLESS, AND IS NOT PRESENTED ON THE RECORD

Petitioner's Question Presented is, "Whether a state may wholly disregard foreign sovereign interests in deciding whether to exercise jurisdiction over a foreign dispute." (Pet. i) This we are told "involves principles of the federal common law of foreign relations (Pet. 1), on which (in a newly minted argument) there is now a "mature division in the lower courts." (Pet. 19).

A. The Issue Raised Is Meritless. The petition presents, not a question, but an invitation for a law review essay. Petitioner invites this Court to tell state courts they "must consider" and give "proper deference" to foreign relations issues while exercising *forum non conveniens* discretion, but is entirely silent on the content of the federal rule to be administered. (Pet. 13) What are the relevant variables? How much "consideration"

must be given to foreign sovereign interests: a little? a lot? Is a state court's statement that it had considered those interests sufficient? Is the suggestion that "the federal common law of foreign relations" somehow federalizes choice of law rules thereby overriding, in whole or part, the Rules of Decision Act, 28 U.S.C. § 1652, as applied in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)?[6] How does an ordinary commercial dispute involving a claim for money damages jeopardize United States foreign affairs interests? And how does any federal common law governing *forum non conveniens* affect subject matter jurisdiction rather than choice of law?

Petitioner's effort to bar Delaware jurisdiction here is breathtaking. It wholly ignores the vital interests that Delaware has in providing fair and efficient forums to decide claims against Delaware business entities. Delaware is the state of incorporation for many major United States corporations, and also for many companies operating principally abroad, including defendant. Companies locate in Delaware to take advantage of Delaware's corporate law reputation, including Delaware courts' reputation for fairness and efficiency in adjudicating commercial disputes. Maintaining Delaware's unparalleled corporate law status is among the state's vital interests. Firms conducting business in foreign places, such as respondents – a Delaware business entity, and its wholly-owned subsidiary – transact business with other Delaware companies on conditions and with a flexibility they

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6. Any displacement of state law by way of a judge made federal common law of foreign relations is exceedingly rare. *See Barclay's Bank, PLC v. Franchise Tax Bd.*, 521 U.S. 298, 327-28 (1983) and *W.S. Kirkpatrick & Co. v. Environmental Factories Corp. International* 493 U.S. 400 (1990), neither of which is even mentioned by petitioner, let alone discussed, but both of which rejected displacement claims based upon claims that the state law interfered with foreign affairs.

might otherwise decline to risk, because they know that, if they believe themselves injured, they can sue in Delaware's courts and get an impartial hearing. This readiness to hear disputes redounds to the benefit of all Delaware corporations, and it increases the state's attractiveness as a provider of corporation related services. Delaware is surely allowed to believe this, and its Supreme Court announced Delaware's "significant interest [in making] available to litigants a neutral forum to adjudicate commercial disputes against Delaware entities" in this very case. (App. 18a) *See* William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law 351 (1992).

B. The Question Presented Is Not Raised by the Record. We see no need to further multiply the difficulties inherent in petitioner's ill-conceived Question Presented. Nor need we explore here the allegedly "mature" conflict now pending in the lower courts, because it is not remotely implicated by this record. The Delaware Supreme Court did not "wholly disregard . . . foreign sovereign interests." (Pet. 3) Far from it. The court gave elaborate consideration to those interests. (App. 25a-32a).

The Delaware Supreme Court carefully analyzed the works of recognized treatise writers and the expert testimony before it, including that of Professor von Mehren and several Argentinian authorities. On that basis it decided that (a) Delaware courts could apply Argentina law, if necessary; (b) neither Argentina nor any instrumentality thereof was a necessary party, or otherwise bound by a Delaware judgment for money damages; (c) Argentina's law does not vest exclusive jurisdiction over this suit in Argentine courts, and, in any event, a simple contract and tort suit for damage to property could not be so "localized;" and (d) the declarations of Argentine interests that defendant procured and itself communicated to the court

showed, on their face, that the declarants did not understand the current posture of this lawsuit. (App. 25a-32a). What approach could be more sensitive to foreign sovereign interests?

The petition does not challenge any of these subsidiary holdings, ones that constitute the foundation for the Delaware court's decision. Nor could it because these are not reviewable federal questions. Petitioner received from the state court the very review it seeks here. This Court is asked to fashion a new limit on state power, and then say to the Delaware Supreme Court that it must do by one name, what it has already done by another. This bizarre contention ignores that the Court's jurisdiction exists "to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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PAN AMERICAN ENERGY, LLC,

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Respondents.

On Petition for a Writ of Certiorari To The Supreme Court of Delaware

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Stripped of its sarcasm, respondents' brief in opposition is nothing more than an evasion of the important federal questions raised in the petition for certiorari. Respondents' jurisdictional objections are unsound. The Delaware Supreme Court's decision by its terms wholly excludes any consideration of foreign sovereign interests in determining whether an American state court may exercise jurisdiction over a foreign dispute. Pet. App. 15a-16a, 18a; Pet. 10. The federal law of foreign relations necessarily governs that question, and that question was passed on below. That is all that is required for this Court's jurisdiction; it matters not whether the court below expressly framed the issue as one of federal law. Nor is there a lack of finality. If the state court's ruling is reversed, respondents' complaint must be dismissed (as the Delaware Court of Chancery had ruled). Accordingly, this case falls well within the fourth rule of pragmatic finality under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Respondents' position, that any ruling embedded within a state court's denial of a *forum non conveniens* motion is *ipso facto* insulated from this Court's review, is unsupported by this Court's precedents and would result in the wholesale abdication of the Court's critical role of ensuring that the exercise of state court jurisdiction does not trench upon the foreign relations of the United States.

Their flawed jurisdictional objections aside, respondents can muster little argument against review. Other than (erroneously) to deny that the court below decided a federal question, respondents have no answer to Pan American's showing of a conflict in the circuits about whether American courts must weigh foreign sovereign interests in declining jurisdiction. Pet. 15-19; *infra* at 7-8. There can be little doubt of the importance of this issue in a global economy where plaintiffs increasingly resort to American courts for resolution of foreign disputes. The paramount importance of

this issue to foreign governments is underscored by the participation of the Republic of Argentina as *amicus curiae* urging review.[1] This Court should grant the petition.

I. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL.

1. Respondents do not seriously contest the merits of Pan American's petition. See Opp. 12 (declining to "explore here the allegedly 'mature' conflict now pending in the lower courts"). Rather, they assert that this Court lacks jurisdiction because the questions decided below "were all framed solely in terms of Delaware law." *Id.* at 7. But these jurisdictional concerns are baseless because the Delaware Supreme Court did, in fact, pass upon an important federal question.

The Delaware Supreme Court held that foreign sovereign interests "have no logical relevance" to whether a state court would exercise jurisdiction over the Argentine dispute, which depends only upon the convenience to the private parties of litigating in Delaware. Pet. App. 16a; Pet. 14. The propriety of state court jurisdiction that trenches on foreign sovereign interests, however, is unquestionably governed by federal law. "The basic choice regarding the competence and function of the Judiciary and National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964). Accordingly, "matters bearing on the Nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'" *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting *Sabbatino*, 376 U.S. at 425).

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[1] The Republic of Argentina's *amicus* brief also dispels respondents' claim that the Argentine government was unaware that respondents had dropped some of their most intrusive claims for injunctive relief, or that doing so in any way mitigated the threat to Argentina's sovereign interests. *See* Opp. 2, 12-13; *cf.* Amicus Br. 6 n.2; *see generally* Pet. 8.

Indeed, respondents do not contest that federal law must govern this question. They raise concerns (answered below) regarding the content of a federal law rule, Opp. 10-11, and argue that federal common law rarely should be invoked, *id.* at 12 n.6, but they do not, and cannot, argue that federal law does not govern questions of state court impairment of foreign sovereign interests. It is unthinkable that this Court has no power to curtail the exercise of state court jurisdiction that jeopardizes the Nation's foreign relations.

Respondents' jurisdictional arguments rest solely on the Delaware court's framing of the issue in state law terms. But it is within this Court's "province to inquire not only whether [a federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support." *Howlett* v. *Rose*, 496 U.S. 356, 366 (1990) (quotation marks omitted). Indeed, this Court must frequently look behind the asserted state law grounds for a decision whenever "it is urged that the decision of the state court rests upon a nonfederal ground." *Abie State Bank* v. *Weaver*, 282 U.S. 765, 773 (1931). This is because it remains necessary for this Court "to ascertain for itself . . . whether the asserted nonfederal ground independently and adequately supports the judgment." *Id.* Because the Delaware Supreme Court's jurisdictional ruling is a question of federal law, this Court has jurisdiction here.

Respondents' further argument that petitioner did not present this federal question to the Delaware Supreme Court is both irrelevant and disingenuous. This Court will exercise jurisdiction if the federal question was either "pressed or passed upon in the state court." *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985); cf. *Illinois* v. *Gates*, 462 U.S. 213, 218-19 (1983) (leaving open the question whether this rule is jurisdictional or prudential). As noted above, the Delaware Supreme Court below did pass upon a federal question. Respondents fail to heed the disjunctive nature of the

"pressed *or* passed upon" test, and the "'elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided.'" *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979) (omission in original); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); Robert L. Stern et al., *Supreme Court Practice* § 3.19, at 185 (8th ed. 2002) ("Once it is clear that the highest state court has actually passed on the federal question, . . . [a]n irrebuttable presumption is created that the federal question was timely and properly raised."). Moreover, the argument is disingenuous because the Court of Chancery had dismissed the complaint on state law grounds, and the federal question did not arise until the Delaware Supreme Court announced the novel rule that foreign sovereign interests are "legally irrelevant" to a determination of whether a state court will exercise jurisdiction. Pet. App. 15a. That holding embodies a clear rule of decision that arises under federal law and warrants this Court's review.

2. Respondents' finality argument is similarly unavailing. The petition fully described how the judgment below satisfies the jurisdictional finality requirement of 28 U.S.C. § 1257, for here "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come," *Cox Broadcasting*, 420 U.S. at 482-83. See Pet. 11-12 & n. 1. Respondents' primary objection to finality – that there was no federal issue finally decided in the case, Opp. 9 – is wrong for the reasons given above. Their secondary objection – that a ruling on the federal question would not preclude "'*further litigation on the relevant cause of action*,'" *id.* (emphasis added) – is likewise untenable. A decision on the federal question in favor of

petitioner will end the case without any litigation on the merits of respondents' tort and contract claims.

Respondents nonetheless suggest that a decision on the federal question would not be preclusive because this Court's disposition of the case "could 'take a number of [other] paths,'" Opp. 9 (alteration in original) (quoting *Nike* v. *Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring)). Justice Stevens's concurrence is inapposite; the federal question at issue in *Nike* was a merits question concerning the test for infringement of commercial speech under the First Amendment. Justice Stevens noted that certain claims might have to be litigated regardless because they did not involve commercial speech, and that some First Amendment standards that the Court could adopt (such as actual malice) would entail factfinding in the litigation of a First Amendment affirmative defense to a state law unfair competition claim. *Nike* v. *Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring). Here, by contrast, there is no possibility of litigation on the merits of respondents' state tort law and contract claims if the federal question of abstention to avoid impairment of federal sovereign interests is resolved in favor of petitioner. Thus, respondents' attempt to distinguish *Cox* is unavailing.

It is clear that the rule announced below – that foreign sovereign interests are irrelevant to a state court's decision to assume jurisdiction, and the plaintiff's choice of forum will be honored unless the defendant can make the "rare" showing that he "will be subjected to overwhelming hardship and inconvenience if required to litigate in [state court]," Pet. App. 15a (internal quotation marks omitted) – cannot be maintained as a rule of federal law, and must be rejected by this Court. The proper federal abstention rule will be decided by this Court on the merits. Respondents fault petitioner for not declaring the metes and bounds of a "one-size-fits-all" federal rule of abstention. Opp. 9-10. There is no need. Under the federal *common law* of foreign relations, this Court

may decide this case on the record before it. What is clear is that federal law requires an American court to dismiss a foreign commercial dispute that: 1) arises on foreign soil; 2) is governed by foreign law; 3) will determine the duties, liabilities, and extraction practices of foreign petroleum producers and foreign surface land owners; and 4) will affect both the foreign nation's production of national energy resources and that nation's revenues. What makes the argument in favor of dismissal overwhelming is the incontrovertible existence of an adequate forum to resolve this dispute. An academic may feel the urge to speculate about broad principles that will apply to every case that may arise in the future, see *id.* at 10, but it is this Court's duty to decide the case before it, and establish the basic principle of foreign relations law that a state court cannot exercise jurisdiction in the circumstances presented in this case. A federal ruling of abstention would unquestionably end the case without further litigation on the merits, and thus this case is squarely within *Cox*.

Respondents also try to shoehorn this case under the doctrine of *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988), a case involving 28 U.S.C. § 1291, whose finality requirements are distinct from those in § 1257. See *Flanagan* v . *United States*, 465 U.S. 259, 265 n.3 (1984). Even putting aside the differences between § 1291 and § 1257, respondents' claim that *Biard* is "quite dispositive" is misplaced. Respondents fail to engage the central point of Pan American's argument: that *Biard* is not controlling because there is no risk that review would enmesh this Court in the merits of the case. As stated in the petition, the Court in *Biard* held that the balancing of the relevant public and private factors in application of ordinary *forum non conveniens* doctrine (such as the location of witnesses and evidence necessary to prove claims and defenses) bore too close a relationship to litigation of the merits to be final under the collateral order doctrine (which is but one grounds for

finality under *Cox*). Pet. 12 n.1; *Biard*, 486 U.S. at 527-29. Petitioner does not ask this Court to conduct the *forum non conveniens* balancing test, which here is a matter of state law, but simply to resolve the federal issue of a state court's duty to abstain from jurisdiction to avoid impairment of foreign sovereign interests. This Court plainly has jurisdiction.

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT ON THE IMPORTANT FEDERAL ISSUE OF WHETHER STATE COURTS MAY EXERCISE JURISDICTION THAT IMPAIRS FOREIGN SOVEREIGN INTERESTS.

1. Its jurisdictional objections overcome, respondents have no basis to oppose certiorari. As noted above, they have no answer to the petition's showing of a significant circuit split on the federal issue decided below. The petition explained how the Delaware Supreme Court rejected the reasoning of the Fifth and Eleventh Circuits, and the Illinois Supreme Court, by concluding that foreign sovereign interests were "legally irrelevant" to the decision of whether to retain jurisdiction. Pet. App. 15a.[2] In doing so, the Delaware

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[2] Respondents remarkably ignore this holding of the Delaware Supreme Court to claim that the state court "gave elaborate consideration to [foreign sovereign] interests," Opp. 12, expressing disbelief that another "approach could be more sensitive to foreign sovereign interests." *Id.* at 13. The passages they cite only deal with the Delaware Supreme Court's erroneous ruling on whether the Argentine courts have exclusive jurisdiction of these claims. *See* Pet. App. 26a-32a. Other courts do not limit the consideration of foreign sovereign interests to whether that nation's courts have formally established exclusive jurisdiction over the dispute in its courts. Moreover, contrary to respondents' claim, petitioner does challenge the exclusive jurisdiction ruling as one of the predicates to a ruling on the federal abstention question. *Id.* at 23a-24a. The nature of foreign jurisdiction is a question of foreign law, but this Court may resolve any issue of foreign or state law that is a predicate to an intelligent resolution of the federal question. *See, e.g.*, *Propper* v. *Clark*, 337 U.S. 472, 490 (1949) (noting that "[w]here a case involves a nonconstitutional federal issue, . . . the necessity for deciding which depends upon the

Supreme Court aligned itself with the Ninth Circuit, which also refuses "to take the interests of [a] foreign government into account" in deciding whether to retain jurisdiction. *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 804 (9th Cir. 2001). The Delaware Supreme Court and the Ninth Circuit are in direct conflict with other jurisdictions, including the Fifth and Eleventh Circuits, and the Illinois Supreme Court. In *Torres* v. *S. Peru Copper Corp.*, 113 F.3d 540, 542-43 (5th Cir. 1997), the Fifth Circuit declined to exercise jurisdiction over a dispute that implicated "Peru's sovereign interests by seeking damages for activities in which the government actively has been engaged." *Id.* at 543. The Eleventh Circuit likewise acknowledged that foreign sovereign interests are "significant" in determining whether to retain jurisdiction over a dispute implicating those interests. *Pacheco de Perez* v. *AT&T Co.*, 139 F.3d 1368, 1378 (11th Cir. 1998); cf. Pet. App. at 115a (describing the Republic of Argentina's "utmost interest that legal questions arising within the framework of the [Hydrocarbon Law] . . ., between the licensees of hydrocarbon and the owners of the surface realty be dealt with in conformity with Argentine law and before the Courts of the Argentine Republic"). Consistent with these approaches, the Illinois Supreme Court takes into account foreign sovereign interests to avoid "'an inappropriate usurpation of a foreign court's proper authority to decide a matter of local interest.'" *Jones* v. *Searles Labs.*, 444 N.E.2d 157, 161 (Ill. 1982). This Court's intervention to provide clarity on this important question of federal law is imperative.

2. The petition also described the Republic of Argentina's crucial sovereign interests in this case, which were expressed by notifying the United States State Department and the Argentine Supreme Court of Argentina's paramount role as owner and manager of the country's oil and gas reserves. See Pet. App. 48a-72a, 115a-116a. The petition further

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decision on an underlying issue of state law, the practice in federal courts has been, when necessary, to decide both issues").

demonstrated how the infringement on Argentine sovereignty is especially severe in this case, where respondents' lawsuit seeks to displace Argentina's carefully prescribed regulatory scheme with "international standards for forest engineering" to govern the legal relationship between hydrocarbon concessionaires and surface owners. *Id.* at 153a.

Respondents try to discredit this analysis by claiming that the Republic of Argentina was unaware that they had withdrawn most of their claims for equitable relief, and its concerns were limited to the effect of injunctions. Opp. 2. Respondents do not even answer the showing in the petition that one of the principal considerations of the Republic of Argentina was the need to maintain the exclusive jurisdiction of the Argentine courts over damages remedies. Pet. 23a. In any event, respondents' argument is laid to rest by the Republic's amicus brief in support of the petition. The Republic of Argentina has informed this Court, in unequivocal terms, that in its current posture "this case . . . threatens [its] sovereign interest in developing and regulating its natural resources," and in implementing "a comprehensive regime regulating and harmonizing the competing interests of surface property owners (such as Respondents) and holders of rights to extract subsurface hydrocarbons (such as Petitioner)," Amicus Br. 1, as well as its revenues from federally owned petroleum resources, *id.* at 5. The Republic notes that the foreign relations of the United States are implicated when state power threatens "a coordinate sovereign's control over a matter crucial to its sovereignty," such as natural resource development, and "[f]oreign nations cannot easily tolerate a regime in which their critical interests are subjected to the regulation of fifty different states." *Id.* at 4. Argentina looks to this Court as "the only American tribunal capable of remedying such divergences" among the states. *Id.* And none of Argentina's concerns is obviated by respondents' withdrawal of certain (but not all) of its claims for equitable

relief, since "[c]ourts shape conduct through damages awards just as surely as they do through injunctions." *Id.* at 6 n.2.

The rule endorsed by the court below, if permitted to stand, sets a dangerous precedent. As respondents note, "Delaware is the state of incorporation for many major United States corporations, and also for many companies operating principally abroad." Opp. 11. That is precisely the problem. Given the vast number of corporations that are incorporated in Delaware, and more still that are subject to personal jurisdiction in Delaware, a foreign plaintiff will have essentially carte blanche to bring any foreign dispute into the Delaware courts. Under the ruling below, no matter the significance of the foreign interests to be litigated, the state court necessarily must exercise jurisdiction unless the defendant can prove overwhelming hardship from litigating in Delaware. Pet. App. 15a. Indeed, far from downplaying this risk, respondents advertise it. See Opp. 12 (citing the Delaware courts' "readiness to hear disputes").

From the perspective of this Nation, needful of maintaining harmony with its fellow nations, this expansive state jurisdictional rule is intolerable. It is not a question solely of whether a state court can properly apply Argentine law, understand translations of foreign witnesses, and accurately resolve disputes (although there are intrinsic difficulties with state court jurisdiction in each of those respects). It is also a question of whether foreign nations will take offense at American state governments assuming the power to decide foreign disputes that are fundamental to their sovereign interests. This Court must be vigilant to ensure that state courts do not exercise jurisdiction in a manner that jeopardizes national foreign relations.

CONCLUSION

For these reasons, and those set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PAN AMERICAN ENERGY, LLC
Petitioner,

v.

CANDLEWOOD TIMBER GROUP, LLC, and
FORESTAL SANTA BARBARA SRL,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

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BRIEF *AMICUS CURIAE* OF THE REPUBLIC OF ARGENTINA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May a state court wholly disregard foreign sovereign interests in deciding whether to exercise jurisdiction over a foreign dispute?

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INTEREST OF *AMICUS CURIAE*[1]

This is a dispute over conflicting uses of land located in the Republic of Argentina. Under Argentina's Constitution, the subsurface resources involved in the case are owned by the country's federal and provincial governments as public utilities for the benefit of the Nation. Given Argentina's profound national interest in ensuring the orderly and efficient development of these public resources, Argentina has established a comprehensive regime regulating and harmonizing the competing interests of surface property owners (such as Respondents) and holders of rights to extract subsurface hydrocarbons (such as Petitioner). The Government of Argentina believes that this case, brought by Respondents in an American state court rather than in the Argentine courts, threatens Argentina's sovereign interest in developing and regulating its natural resources. Underlining the depth of Argentina's concern regarding this case, its Embassy has found it necessary to notify the United States Department of State of Argentina's "utmost interest" in seeing that this dispute is resolved in Argentine courts.

In the decision below, the Delaware Supreme Court deemed Argentina's overwhelming sovereign interest in this case "legally irrelevant" to the court's *forum non conveniens* analysis. That decision not only conflicts with the decisions of other American jurisdictions, but it also exposes Argentina's economy and environment to the *ad hoc* management of foreign tribunals with no appreciation for either the subtleties of the law of Argentina or the nation's

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* or its counsel, contributed monetarily to the preparation or submission of this brief. *Amicus* is filing this brief with the consent of the parties. Written consents are on file with the Clerk.

paramount interest in the management of its natural resources. Accordingly, the Republic of Argentina has a profound interest in seeing the Delaware Supreme Court's decision corrected and brought into conformity with the views of most other American courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case implicates interests at the core of Argentina's sovereignty -- namely its ability to manage the exploitation of its natural resources. The Respondents in this case, Candlewood Timber Group, LLC ("Candlewood") and Forestal Santa Barbara SRL ("FSB") harvest timber from land in Argentina's Salta Province. Pet. App. 2a. Petitioner Pan American Energy, LLC ("Pan American") extracts oil and gas from the same land and is Argentina's second largest hydrocarbon producer. *Id.* Pan American extracts these hydrocarbons under concessionary rights granted by the Argentine Government, which, under the Constitution, retains ownership of all hydrocarbon fields as public utilities. *Id.*; *see also id.* at 59a. The Government derives substantial revenues from royalties paid by concessionaires such as Pan American. *Id.* at 44a. Respondents contend that Pan American damaged the surface of the land, impairing their forestry operations, and they filed suit in Delaware state court. *Id.* at 3a.

The parties' dispute involves a topic over which Argentina has established a comprehensive regulatory framework. To harmonize the activities of concessionaires and surface land users, the Argentine Hydrocarbon Law and other enactments precisely and exhaustively define the rights and duties of each party. *Id.* at 60a-63a. These regulations further a national policy of aggressive yet well-managed development of natural resources. *Id.* at 53a n.1, 61a. Thus, while in some nations a dispute such as that involved in this

case might be regarded as a purely private dispute, such is not the view in Argentina.

Shortly after Candlewood and FSB filed their lawsuit in Delaware, Pan American filed a petition in the Supreme Court of Argentina asserting that the Argentine courts had exclusive jurisdiction over the dispute. *Id.* at 43a. The Attorney General of Argentina issued an opinion supporting the Argentine courts' exclusive jurisdiction, and the Republic of Argentina and the Province of Salta (both of which derive substantial income from Pan American's activities) joined as parties in the Supreme Court of Argentina. *Id.*

The Government of Argentina has formally expressed its objections to the Delaware lawsuit in a letter to the United States State Department. The letter from the Argentine Embassy reiterated the Attorney General's opinion regarding jurisdiction and stated Argentina's view that "it is of its utmost interest that legal questions arising [under the Hydrocarbon Law] be dealt with . . . before the Courts of the Argentine Republic." *Id.* at 115a-116a.

Notwithstanding Argentina's overwhelming interests in this case, the Delaware Supreme Court has allowed this case to go forward in its trial courts, rejecting Pan American's *forum non conveniens* objection. Disregarding its duty under supreme federal common law to attend to the foreign relations implications of its analysis, the Delaware court applied its own particular state law rules and considered only the narrow interests of the private litigants. *Id.* at 15a-16a. Remarkably, it went so far as to hold that Argentina's sovereign interests were "legally irrelevant." *Id.* at 15a; *see also id.* at 16a (stating that Argentina's interests "have no logical relevance").

The Delaware Supreme Court's erroneous decision requires this Court's review for two reasons. *First*, this

decision has substantial implications for the foreign relations of the United States because it threatens a coordinate sovereign's control over a matter crucial to its sovereignty -- its ability to regulate the development of its natural resources. Foreign nations cannot easily tolerate a regime in which their critical interests are subjected to the regulation of fifty different states, each applying its own idiosyncratic views, particularly in a matter so central to domestic sovereignty as the management of the nation's natural resources according to its own laws. Argentina regards this threat as serious enough to merit an official notification to the State Department, and it renews its expression of deep concern here. *Second*, not only is this case one of high importance given the foreign relations considerations involved, but the Delaware Supreme Court's decision also conflicts with decisions of other federal and state courts that have properly recognized the need to take into account the interests of foreign nations in deciding whether to assert jurisdiction over disputes that implicate the fundamental interests of other sovereign nations.

REASONS FOR GRANTING THE PETITION

The Republic of Argentina wholeheartedly agrees with this Court's observation that "matters bearing on the Nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'" *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964)). This Court is the only American tribunal capable of remedying such divergences, and it should grant review in this case in order to ensure that all American courts honor the interests of foreign sovereigns.

1. Wholly apart from the fact that the Delaware court's decision conflicts with other authorities, this case merits

review because of its importance to international relations. As Congress and the courts have long recognized, few aspects of a nation's sovereignty are more crucial than its ability to control the natural resources within its own territory. *See, e.g., United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1997) (noting that Congress "recognizes the authority of other sovereigns to protect and exploit their own resources"); *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553, 568 (C.D. Cal. 1979) ("By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes."), *aff'd* 649 F.2d 1354 (9th Cir. 1981). National sovereignty over exploitation of natural resources is likewise a well-entrenched principle of international law. *See* G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

These considerations of sovereignty are heightened in this case because Argentina's Constitution reserves ownership of subsurface hydrocarbons to the Government. Thus, this is not merely a dispute regarding land *in* Argentina, but it is rather a dispute regarding the handling of vital natural resources owned by Argentina itself. As explained above, Argentina views the development of its oil and gas resources as a central national interest. Reflecting this concern, the Government of Argentina declared in its filings in the Supreme Court of Argentina that this case puts "basic institutions of the Nation . . . at risk" and that "Argentine sovereignty and provision of public services are at stake." Pet. App. 70a-71a. Indeed, the Delaware trial court recognized (in a conclusion incorrectly deemed "irrelevant" by the Delaware Supreme Court) that this case would "implicate Argentina's economic interests" because it could affect the revenues the Government derives from its concessionaires' activities. *Id.* at 44a.

Given the stakes involved in cases like this one, it is no surprise that courts have long recognized "the conflict of national interests that is created by the attempt of one state to regulate resource development in another state." *Mitchell*, 553 F.2d at 1003 n.13. The decision below, however, is destined to lead to the entanglement of the state courts with the national interests of Argentina.[2] This potential for tension between sovereigns is, of course, precisely why such cases implicate federal concerns and federal common law. *See Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (explaining that federal common law governs "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). The need for the United States to speak with one voice on matters bearing on foreign relations is a need not only of the United States but of other countries interacting with the United States as well. The decision of the Delaware Supreme Court disserves this important need by relying solely on state-law considerations of hardships on private litigants, overlooking that Argentina does not regard this as a wholly private dispute.

2. This Court should also grant certiorari because the decision below conflicts with decisions of other American courts, both federal and state, that recognize that federal law

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[2] That the current version of Respondents' complaint has dropped some claims for extremely intrusive equitable relief hardly reduces the level of interference with Argentina's policies. Courts shape conduct through damage awards as surely as they do through injunctions. *Cf. Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997) (explaining that an action concerning mining activities in Peru threatens "Peru's sovereign interests by *seeking damages* for activities and policies in which the government actively has been engaged" (emphasis added)). And, in any event, the complaint seeks equitable relief as well as damages. Pet. App. 156a.

requires them to take foreign sovereign interests into account in their decisions regarding jurisdiction over foreign disputes. Among other conflicts identified in Pan American's Petition for a Writ of Certiorari at 14-19, the Delaware court's decision flatly contradicts a decision of a federal court of appeals that arose in virtually identical factual circumstances. *See Torres v. S. Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997). The plaintiffs in *Torres* brought state-law causes of action predicated on injuries they allegedly sustained in connection with mining and refining activities in Peru. *Id.* at 541. The nation of Peru was not a party to the suit, but (as here) it filed a letter with the State Department asserting its vital interests in the case. *Id.* at 542. Heeding Peru's expression of its sovereign interests, the Fifth Circuit observed that, *inter alia*, the government of Peru extensively regulated the mining industry and owned and licensed rights to the minerals involved in the defendant's operations. *Id.* at 543. The court concluded that the case "strikes . . . at Peru's sovereign interests" and "raises substantial questions of federal law by implicating the federal common law of foreign relations." *Id.* at 542-43. Accordingly, the Fifth Circuit affirmed the district court's dismissal of the case on grounds of comity and *forum non conveniens*. *Id.* at 542, 544.

Likewise, American state courts have explicitly taken the interests of foreign nations into account in their *forum non conveniens* analysis. For example, in *Jones v. Searle Laboratories*, the Illinois Supreme Court relied on such considerations in affirming the *forum non conveniens* dismissal of a tort action brought by a group of British subjects. 444 N.E.2d 157 (Ill. 1982). The suit concerned the product warning labels of a British company, which designed its labels to satisfy British regulatory standards. *Id.* at 161. The Illinois Supreme Court properly recognized that an Illinois court should not be permitted to "determine that

defendant's warnings were inadequate although they conformed to the law of the country in which the drugs were marketed." *Id.* Using language that might well have been addressed to the Delaware Supreme Court's attempt to regulate Argentina's natural resources, the Illinois Supreme Court stated that a trial in Illinois would amount to "an inappropriate usurpation of a foreign court's proper authority to decide a matter of local interest." *Id.* (internal quotation marks omitted).

In contrast to these and other thoughtful authorities discussed in Pan American's Petition, the Delaware Supreme Court deemed the interest of foreign nations "irrelevant" to its analysis. Pet. App. 15a. Eschewing the weighty federal concerns found so important by most courts, it decided the case solely based on the state-law factor of whether the private litigant would suffer overwhelming hardship. *Id.* at 16a, 19a. Furthering the conflict with courts such as the Fifth Circuit, the Delaware court joined the Ninth Circuit in ignoring the Republic of Argentina's formal letter to the State Department. *See Patrickson v. Dole Food Co.*, 251 F.3d 795, 804 & n.9 (9th Cir. 2001), *aff'd on other grounds*, 538 U.S. 468 (2003).

The Republic of Argentina believes that it is essential that the American courts speak with a single voice on these matters. Only review by this Court can ensure that they do so.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition, this Court should grant certiorari.

Respectfully submitted,

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